133-333

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1261.

SAMUEL D. DAVIS, APPELLANT,

vs.

H. G. BEASON, SHERIFF OF ONEIDA COUNTY, IDAHO TERRITORY.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF THE TERRITORY OF IDAHO.

FILED SEPTEMBER 30, 1889.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 1, 1889.

1 In the District Court of the Third Judicial District, Territory of Idaho, County of Oneida.

In the Matter of the Application of SAMUEL D. DAVIS for a Writ of *Habeas Corpus.*

To the said court:

The petition of Samuel D. Davis respectfully shows—

That said petitioner is imprisoned and restrained of his liberty by H. G. Beason, sheriff of the county of Oneida, in the Territory of Idaho, at the town of Malad, in said county; that said imprisonment is under and by virtue of the indictment, plea to said indictment, verdict of conviction, judgment, and warrant issued thereon, hereto annexed, marked, respectively, Exhibits "A," "B," "C," "D," and "E," and made a part hereof, being the record of the proceedings of this court in the case of the Territory of Idaho against said petitioner, impleaded with the other defendants named in said indictment.

That said imprisonment and restraint are illegal, and that
2 such illegality consists in this:

1. The facts in said indictment and record do not constitute a public offense, and the said acts charged therein are and were not criminal or punishable under any statute or law of said Territory.

2. So much of the statutes of said Territory which provides that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy or any other crime defined by law as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization" is a "law respecting an establishment of religion," in violation of the first amendment of the Constitution and void.

Wherefore said petitioner prays the issuance of the writ of *habeas corpus* to the end that he may be discharged from imprisonment.

S. D. DAVIS.

3 TERRITORY OF IDAHO, } ss:
County of Oneida, }

Samuel D. Davis, being first duly sworn, on his oath says I am one of the parties to the foregoing petition; have heard the same read and know the contents thereof, and that the same is true of my own knowledge.

SAMUEL D. DAVIS.

Subscribed and sworn to before me this 12th day of September, 1889.

A. L. RICHARDSON, *Clerk.*

4 [Endorsed:] In the district court in and for Oneida county, I. T. In the matter of the application of Samuel D. Davis for a writ of *habeas corpus*. Petition. Filed Sept. 12, 1889. A. L. Richardson, clerk.

5 EXHIBIT "A."

Indictment.

THE TERRITORY OF IDAHO
vs.
D. L. EVANS, JENKINS JONES, JAS. H. CHIVERS, BENJAMIN WILLIAMS, William T. Griffiths, John G. Evans, William T. Evans, Thomas W. Thomas, J. R. Thomas, Thomas Edward Thomas, George Thomas, Hugh W. Thomas, William Lusk, John W. Lusk, Jr., Nephi Lewis, David Reynolds, John C. Jensen, John E. Owens, William E. Jones, David E. Jones, Brigham E. Jones, C. Moss, Hyrum Ashton, Samuel D. Williams, T. J. Howell, David Jenkins, W. P. Camp, William Morse, William E. Hawkins, H. S. Powell, Samuel D. Davis, John Jenkins, John E. Price, William L. Jones, Jeremiah Jones, George Williams, John E. Price, Sr., Evan Jenkins, Thomas R. Roberts, August Bingham, Edward Taylor, D. L. Hoopes, A. Campbell, Luman Taylor, Melvin Henderson, Nathan Smith, John Sant, John G. Sant, E. H. Hooker, Henry Dixon, Jensen Mickelsen, Nephi M. Perkins, Andrew Nelson, M. M. M. Martin, and C. A. Norton.

6 In the District Court of the Third Judicial District of the Territory of Idaho, in the County of Oneida. April Term, A. D. eighteen hundred and eighty-nine.

The said D. L. Evans, Jenkin Jones, Jas. H. Chivers, Benjamin Williams, William T. Griffiths, John G. Evans, William T. Evans, Thomas W. Thomas, J. R. Thomas, Thomas Edward Thomas, George Thomas, Hugh W. Thomas, William Lusk, John W. Lusk, Jr., Nephi Lewis, David Reynolds, John C. Jensen, John E. Owens, William E. Jones, David E. Jones, Brigham E. Jones, C. Moss, Hyrum Ashton, Samuel D. Williams, T. J. Howell, David Jenkins, William T. Camp, William Morse, William E. Hawkins, H. S. Powell, Samuel D. Davis, John Jenkins, John E. Price, William L. Jones, Jeremiah Jones, George Williams, John E. Price, Sr., Evan Jenkins, Thomas R. Roberts, August Bingham, Edward Taylor, D. L. Hoopes, A. Campbell, Luman Taylor, Melvin Henderson, Natahan Smith, John Sant, John G. Sant, E. H. Hooker, Henry Dixon, Jensen Mickelson, Nephi W. Perkins, Andrew Nelson, M. M. M. Martin, and C. A. Norton are accused by the grand jury of the said county of Oneida by this indictment of the crime of conspiracy, committed as follows:

The said D. L. Evans, Jenkin Jones, Jas. H. Chivers, Benjamin Williams, William T. Griffiths, John G. Evans, William T. Evans, Thomas W. Thomas, J. R. Thomas, Thomas Edward Thomas, George

Thomas, Hugh W. Thomas, William A. Lusk, John W. Lusk, Jr., Nephi Lewis, David Reynolds, John C. Jensen, John E. Ownes, William E. Jones, David E. Jones, Brigham E. Jones, C. Moss, Hyrum Ashton, Samuel D. Williams, T. J. Howell, David Jenkins,
7 William T. Camp, William Morse, William E. Hawkins, H. S. Powell, Samuel D. Davis, John Jenkins, John E. Price, William L. Jones, Jeremiah Jones, George Williams, John E. Price, Sr., Evan Jenkins, Thomas R. Roberts, August Bingham, Edward Taylor, D. L. Hoopes, A. Campbell, Luman Taylor, Melvin Henderson, Nathan Smith, John Sant, John G. Sant, F. H. Hooker, Henry Dixon, Jensen Mickelsen, Nephi W. Perkins, Andrew Nelson, M. M. M. Martin, and C. A. Norton and divers other persons whose names are to the grand jurors unknown, on the 27 day of October, A. D. eighteen hundred and eighty-eight, at the county of Oneida, in the Territory of Idaho, did unlawfully, wickedly, maliciously, and corruptly conspire, combine, confederate, and agree together, unlawfully, to commit acts for the perversion and obstruction of the due administration of the laws of Idaho Territory, which acts they then and there so conspired to commit were that they each and all should then and there unlawfully and wilfully procure themselves, each and all and each other, unlawfully to be admitted to registration as electors of said Oneida county for the general election then next to ensue in said Oneida county and Idaho Territory, when they each and all were not entitled to be admitted to such registration under the laws of Idaho Territory; and they and each of them did thereafterwards, to wit, on the 27 day of October, A. D. 1888, in pursuance of and according to said conspiracy, combination, confederacy, and agreement together as aforesaid, unlawfully and wilfully cause and procure themselves, each and all and each other, unlawfully to
8 be admitted to registration as electors of said county for said election by then and there each personally appearing before the respective registrars of the election precincts of said county in which they, namely, the said persons so conspiring, respectively resided, and then and there taking and causing to be duly administered to them by the said registrars, respectively, the elector oath prescribed by the statute of said Territory in such case made and provided (the said registrars being then and there each duly authorized to administer said oath), in substance as follows:

I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one (21) years (or will be on the 6 day of November, 1888); that I have (or will have) actually resided in this Territory four months and in this county for thirty days next preceding the day of the next ensuing election; that I have never been convicted of treason, felony, or bribery; that I am not registered or entitled to vote at any other place in this Territory, and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy or any other crime defined by law as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal

rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel,
9 or encourage any person to commit the crime of bigamy or polygamy or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof and the laws of this Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God."

When in truth and in fact they and each of them were then and there members of an order, organization, and association, namely, the Church of Jesus Christ of Latter-Day Saints, then and there otherwise and commonly known as the Mormon Church, which, as each and all of them then and there well knew, taught, advised, counselled, and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization, and association, and which said order, organization, and association, as they each and all then and there well knew, practiced bigamy and polygamy and plural and celestial marriage as doctrinal rites of said organization, and in pursuance of and according to said conspiracy, combination, confederacy, and agreement together as aforesaid in taking said oath the said D. L. Evans, Jenkin Jones, Jas. H. Chivers, Benjamin Williams, William T. Griffiths, John G. Evans, William T. Evans, Thomas W. Thomas, J. R. Thomas, Thomas Edward Thomas, George Thomas, Hugh W. Thomas, William Lusk, John W. Lusk, Jr., Nephi Lewis, David Reynolds, John C. Jensen, John E. Owens, William E. Jones, David E. Jones, and Brigham E. Jones then and there went before L. M. Earl, registrar of
10 Malad precinct, the same being then and there an election precinct of said county, and then and there, at said precinct, took and had administered to them, respectively, the oath aforesaid; and C. Moss, Hyrum Ashton, Samuel D. Williams, T. J. Howell, David Jenkins, William P. Camp, William Morse, William E. Hawkins, H. S. Powell, Samuel D. Davis, John Jenkins, John E. Price, William L. Jones, Jeremiah Jones, George Williams, John E. Price, Sr., Evan Jenkins, Thomas R. Roberts then and there went before William L. John, registrar of Samaria precinct, the same being then and there an election precinct of said county, and then and there, at said precinct, took and had administered to them, respectively, the oath aforesaid; and the said August Bingham, Edward Taylor, D. L. Hoopes, A. Campbell, Luman Taylor, Melvin Henderson, Nathan Smith, John Sant, John G. Sant, E. H. Hooker, Henry Dixon, John Mickelsen, Nephi W. Perkins, Andrew Nelson, M. M. M. Martin, and C. A. Norton then and there went before David Lapray, registrar of Dayton precinct, the same being then and there an election precinct of said county, and then and there, at said precinct, took and had administered to them, respectively, the oath aforesaid.

WILLIAM BRADBURY,
Foreman of the Grand Jury.
D. W. STANDROD,
District Attorney.

11 *Names of Witnesses Examined Before the said Grand Jury on Finding the Foregoing Indictment.*

L. M. Earl, David Lapray, William L. John, George Stuart, Jonah Evans, John Clark, John Lewis, F. E. Jones, Edmund T. Richards, C. R. Thomas, Samuel Thorpe, David Morgan.

Endorsed: Indictment for conspiracy. The Territory of Idaho *vs.* D. L. Evans *et al.* A true bill. William Bradbury, foreman of the grand jury. Presented by the foreman of the grand jury, in the presence of the grand jury, in open district court of the county of Oneida, Territory of Idaho, and filed as a record of said court this 8 day of April, A. D. 1889. A. L. Richardson, clerk. D. W. Standrod, district attorney.

12 EXHIBIT B.

In the District Court of the Third Judicial District of Idaho Territory in and for Oneida County. September Term, 1889.

Hon. C. H. Berry, presiding judge.

WEDNESDAY, *Sept. 4th*, 1889.

TERRITORY OF IDAHO *vs.* D. L. EVANS *et al.* } Crim. No. 21. Conspiracy.

On this day came the def'ts, D. L. Evans, Jenkin Jones, Wm. T. Evans, Thos. W. Thomas, John R. Thomas, Samuel D. Davis, David E. Jones, Geo. Thomas, James H. Shivers, Wm. T. Griffith, Nephi Lewis, and John Owens, by their attorney, J. L. Rawlins, Esqr., and thereupon the formal arraignment of said def'ts was waived and ordered that the said def'ts plead to said indictment on to-morrow, the 5th inst.

13 SATURDAY, *Sept. 7th*, 1889.

TERRITORY OF IDAHO *vs.* D. L. EVANS *et al.* } Crim. No. 21. Conspiracy.

On this day the demurrer of the defendants, D. L. Evans, Jenkin Jones, Wm. T. Evans, Thomas W. Thomas, John R. Thomas, Samuel D. Davis, David E. Jones, Geo. Thomas, Jas. H. Chivers, Wm. T. Griffith, Nephi Lewis, & John Owens, to the indictment herein was by the respective counsel submitted to the court without argument; upon consideration whereof the court ordered that said demurrer be, and is hereby, overruled. * * *

Thereupon the said defendants above named, by their counsel, J. L. Rawlins & J. N. Kimball, Esqrs., plead separately that he is not guilty of the offense charged in the indictment.

14 EXHIBIT "C."

District Court, Oneida County.

TERRITORY OF IDAHO
vs.
D. L. EVANS *et al.* } Conspiracy.

We, the jury in the above-entitled cause, find Samuel D. Davis guilty as charged in the indictment, but disagree on the others.

J. M. MORGAN, *Foreman.*

15 EXHIBIT D.

In the District Court of the Third Judicial District of Territory of Idaho. September Term, A. D. 1889.

Present: Hon. C. H. Berry, judge.

THE TERRITORY OF IDAHO
against
D. L. EVANS *et al.* } Convicted of Conspiracy.

Now, on this 12th day of September, 1889, the district attorney, with the defendant, Samuel D. Davis, and his counsel, came into court. The defendant was duly informed by the court of the nature of the indictment found against him for the crime of conspiracy, committed on the 27th day of October, 1888, of his arraignment, and plea of "Not guilty as charged in said indictment," of his trial and the verdict of the jury, on the 12th day of September, A. D. 1889, "Guilty as charged in the indictment." The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court:

Now, therefore, the said defendant having been convicted of the crime of conspiracy, it is hereby considered and adjudged that the said defendant, Samuel D. Davis, do pay a fine of $500.00, and that in default of the payment of said fine that he be confined in the county jail of Oneida county for a term not exceeding two hundred and fifty days; and it is further ordered and adjudged that said defendant be, and is hereby, remanded to the custody of the sheriff of Oneida county until this judgment is satisfied.

16 [Endorsed:] No. —. Judgment and commitment. In the district court, third judicial district, in and for Bingham county. The People, etc., *vs.* —— ——. —— ——, district judge. —— ——, district clerk.

17 *Order for Writ.*

In the District Court of the Third Judicial District of Idaho Territory in and for Oneida County. September Term, 1889.

Hon. C. H. Berry, presiding judge.

THURSDAY, *Sept. 12th*, 1889.

In the Matter of the Application of SAMUEL D. DAVIS for a Writ of *Habeas Corpus.*

This day came on to be heard the petition of Samuel D. Davis for a writ of *habeas corpus;* and thereupon the court, after hearing said petition, orders that said writ issue in accordance with the prayer of said petition, and that it be made returnable at 3 o'clock p. m. of this day.

18 *Writ of Habeas Corpus.*

In the District Court of the Third Judicial District of the Territory of Idaho in and for the County of Oneida.

The People of the United States in the Territory of Idaho to H. G. Beason, sheriff of Oneida county, Greeting:

We command you that you have the body of Samuel D. Davis by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Samuel D. Davis shall be called or charged, before this district court of the third judicial district of the Territory of Idaho, at the court-room of the district court of said district in and for the county of Oneida, on the 12th day of September, A. D. 1889, at three o'clock in the afternoon of that day, to do and receive what shall then and there be considered concerning the said Samuel D. Davis.

And have you then and there this writ.

Witness Hon. C. H. Berry, judge of the said district [SEAL.] court, at the court-room thereof, in the county of Oneida, this 12th day of September, A. D. 1889.

Attest my hand and the seal of said court the day and year last above written.

A. L. RICHARDSON, *Clerk,*
By —— ——, *Deputy Clerk.*

19 [Endorsed:] District court, 3d judicial district, county of Oneida. In the matter of the application of Samuel D. Davis for a writ of *habeas corpus.* Writ of *habeas corpus.* Filed ——, 18–. —— ——, deputy clerk.

20 In the District Court, 3d Judicial District of Idaho, in and for Oneida County.

In the Matter of the Application of SAMUEL D. DAVIS for a Writ of *Habeas Corpus.*

Now comes H. G. Beason, sheriff of Oneida county, Idaho Territory, and for answer and return of the writ of *habeas corpus* issued out of the district court of the 3d judicial district of Idaho in and for Oneida county alleges that the said Samuel D. Davis is in his custody, and is held by him by virtue of a writ of committment issued out of the district court of the third judicial district of Idaho in and for Oneida county, dated September 12th, 1889, a true copy of which is hereunto attached, and by virtue of the record in the case of the Territory of Idaho against D. L. Evans, copies of which, marked Exhibits "A," "B," "C," "D," and "E," are attached to the application of the said Samuel D. Davis herein and made a part of this return; and the said H. G. Beason does now deliver the
21 body *and body* of the said Samuel D. Davis into this court.

H. G. BEASON,
Sheriff of Oneida County, Idaho T'y.

[Endorsed:] In the district court, 3d judicial district of Idaho in and for Oneida county. In the matter of Samuel D. Davis for writ of *habeas corpus.* Return of writ of *habeas corpus.* Filed Sept. 12, 1889. A. L. Richardson, clerk.

22 In the District Court of the Third Judicial District, Territory of Idaho, County of Oneida.

In the Matter of the Application of SAMUEL D. DAVIS for a Writ of *Habeas Corpus.* } Answer and Exception to the Return.

Comes now the petitioner in the above-entitled matter, Samuel D. Davis, and admits the facts stated in the return of H. G. Beason, sheriff of Oneida county, Idaho Territory, to the writ of *habeas corpus* issued herein, but excepts to the sufficiency of said facts in this, that said facts are not sufficient in law to justify his detention in custody by said H. G. Beason, sheriff as aforesaid, and prays that said return be quashed, and that he be discharged.

SAMUEL D. DAVIS,
By JAS. N. KIMBALL &
J. L. RAWLINS,
His Attorneys.

23 [Endorsed:] In the district court, third judicial district, in and for Oneida county. In the matter of Samuel D. Davis for a writ of *habeas corpus.* Answer and exception to the return. Filed Sept. 12, 1889. A. L. Richardson, clerk. J. L. Rawlins and J. N. Kimball, att'ys for applicant.

24 *Judgment Refusing Discharge.*

In the District Court of the Third Judicial District of Idaho Territory in and for Oneida County. September Term, 1889.

Hon. C. H. Berry, presiding judge.

THURSDAY, *Sept.* 12*th*, 1889.

In the Matter of the Application of SAMUEL D. DAVIS for a writ of *Habeas Corpus.*

On the production before this court of the body of Samuel D. Davis upon a writ of *habeas corpus* duly issued out of this court for the production of the body of said Samuel D. Davis, the same having come on for hearing on the petition, return, answer, and exceptions to the return, and it being made to appear that the said Samuel D. Davis is held in custody by the sheriff of Oneida county for the reasons stated in the application for said writ, and it appear-
25 ing to this court that said facts do not show sufficient cause for the discharge of said Samuel D. Davis from said custody, it is ordered that said defendant be, and he is hereby, remanded to custody of said sheriff of Oneida county, Territory of Idaho.

26 *Order Allowing Appeal & Fixing Bond.*

In the District Court of the Third Judicial District of Idaho Territory in and for Oneida County. September Term, 1889.

Hon. C. H. Berry, presiding judge.

THURSDAY, *Sept.* 12*th*, 1889.

In the Matter of the Application of SAMUEL D. DAVIS for a Writ of *Habeas Corpus.*

On motion of J. L. Rawlins & J. N. Kimball, Esqrs., on behalf of petitioner, to be allowed an appeal to the Supreme Court of the United States from the judgment made herein this day for an order fixing the amount of the undertaking upon such appeal, it is ordered that the petitioner be allowed an appeal herein to the Supreme Court of the United States, and that such appeal be allowed
27 upon an undertaking in the sum of one thousand dollars being filed and approved.

28 Know all men by these presents that we, David L. Evans and Jenkin Jones, of Malad, county of Oneida and Territory of Idaho, are held and firmly bound unto H. G. Beason, sheriff of the said Oneida county, in the full and just sum of one thousand dollars, to be paid to the said H. G. Beason, his attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of September, A. D. 1889.

Whereas at a term of the district court of the third judicial district, Territory of Idaho, in a suit depending in said court between Samuel D. Davis and H. G. Beason, sheriff of the county of Oneida, in said Territory, upon an application for a writ of *habeas corpus*, judgment was rendered against said Samuel D. Davis, and the said party last above named having, in open court at said term,
29 obtained the allowance of an appeal from said judgment of said district court to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said appellant shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID L. EVANS. [SEAL.]
JENKIN JONES. [SEAL.]

Approved Sept. 12, 1889.

C. H. BERRY,
Judge Dist. Court.

30 [Endorsed:] In the matter of the application of Samuel D. Davis for a writ of *habeas corpus*. Bond upon appeal. Filed Sept. 12, 1889. A. L. Richardson, clerk.

31 TERRITORY OF IDAHO, } *ss:*
County of Oneida, }

I, A. L. Richardson, clerk of the district court of the third judicial district in and for Oneida county, do hereby certify that the foregoing is a full, true, and correct copy of the original petition of Samuel D. Davis for a writ of *habeas corpus*, with the Exhibits A, B, C, D; also order for writ, writ of *habeas corpus* & return, answer & exceptions to return to writ, judgment refusing discharge, order allowing appeal to the Supreme Court of the United States and fixing amount of undertaking on appeal, & bond on appeal approved by this court, as the same appears of record and on file in my office in said county.

Seal U. S. District Court, Third Judicial District, Idaho Territory.

Witness my hand and the seal of said court, affixed at Malad, Oneida Co., Idaho, this 12th day of September, 1889.

A. L. RICHARDSON, *Clerk.*

Endorsed on cover: Idaho Territory district court, 3d judicial district. No. 1261. Samuel D. Davis, appellant, *vs.* H. G. Beason, sheriff of Oneida county, Idaho Territory. Filed September 30, 1889.

IN THE

Supreme Court of the United States.

SAMUEL D. DAVIS, Appellant,
vs.
H. G. BEASON, SHERIFF OF ONEIDA COUNTY, IDAHO TERRITORY, Appellee.
No. 1261.

Appeal from the Third Judicial District of the Territory of Idaho.

Now comes the above-named appellant, Samuel D. Davis, pursuant to Rule 26 of this court, in such case provided, and moves the court to advance the above-named case, No. 1261, and to set the same for hearing at as early a day as may be consistent with the pleasure and convenience of the court; and, for grounds of said motion, the said appellant assigns the following:

First. That this appellant is imprisoned in the jail of the county of Oneida, in the Territory of Idaho, under and pursuant to the judgment and order of the District Court of the Third Judicial District of Idaho Territory, in and for said county, pronounced at the September Term, 1889. (R., 9.)

Second. That the pretended offence with which this appellant was charged in the indictment, (R., 2–4, inclusive,) and of which appellant was convicted, and for which he was sentenced, in the judgment aforesaid, (R., 9,) is not an offence under any valid law of the Territory of Idaho, or of the United States, nor do the acts and facts charged in such indictment constitute any crime

whatever of which said court had or could take jurisdiction.

Third. That so much of the statutes of said Territory as provide, in substance, that no person is entitled to register or vote at any election, who is "a member of any order, organization, or association, which teaches, advises, councils, or encourages its members, devotees, or any other person, to commit the crimes of bigamy or polygamy, or any other crime defined by any law as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization," is a "law respecting an establishment of religion," and is in violation of the First Amendment of the Constitution of the United States, and is void.

Fourth. That the test oath, set forth in said indictment, (Rec., 3–4, folios 8 and 9,) as prescribed and required to be taken, by the alleged statute of said Territory, as a condition precedent to, or qualification for registration and voting, under the laws of said Territory, is in contravention of the provisions of the Constitution of the United States, and of the Amendments to such Constitution, and is void.

Fifth. That the act or matter with which appellant was charged in said indictment, and of which he was convicted, and for which he is now imprisoned, is not that he was guilty of bigamy or of polygamy, or of plurality of marriage, or that he taught or inculcated such practices, or even that he personally believed in these practices, or either of them, or that he conspired with others to commit either of these offences, or to inculcate such practices; but, on the contrary, the only alleged offence of which appellant was charged and convicted, was and is that he was a member of the church of Jesus

Christ of Latter Day Saints, known as the Mormon Church, which inculcated said practices; which membership, it is alleged, disqualified appellant for registration as an elector, and that, notwithstanding such disqualification, appellant conspired to register as an elector, and did procure registration.

And appellant says that said imprisonment of appellant, is, therefore, one inflicted upon appellant for the mere fact of his membership in a particular church, and for his (appellant's) religious opinions and associations, and is, therefore, in contravention of the provisions of the Constitution of the United States.

F. S. RICHARDS,
SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
Counsel for Appellant.

The following stipulation was made in the court below by the counsel for the Sheriff of Oneida county, Idaho, which is placed on file with the clerk of the court:

Supreme Court of the United States.
October Term 1889.

In re SAMUEL D. DAVIS, *Appellant*,
vs.
H. G. BEASON, SHERIFF, ONEIDA COUNTY, IDAHO, *Respondent.* } No. 1261.

Appeal from judgment of Third District Court of Idaho, refusing Writ of Habeas Corpus.

The respondent herein, H. G. Beason, sheriff of Oneida county, hereby assents to appellant's motion to have this cause advanced on the docket of the Supreme Court of the United States, and set for hearing at an early date.

(Signed) H. W. SMITH,
Attorney and Counsel for Respondent.

No. 1261.

Supreme Court of the United States.

SAMUEL D. DAVIS, Appellant,

vs.

H. G. BEASON, Sheriff of Oneida County, Idaho, Respondent.

MOTION TO ADVANCE.

F. S. RICHARDS,
SAMUEL SHELLABARGER, and
JEREMIAH M. WILSON,
Counsel for Appellant.

FILED,
DEC 2 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1889.

No. 1261.

SAMUEL D. DAVIS,

APPELLANT,

v.

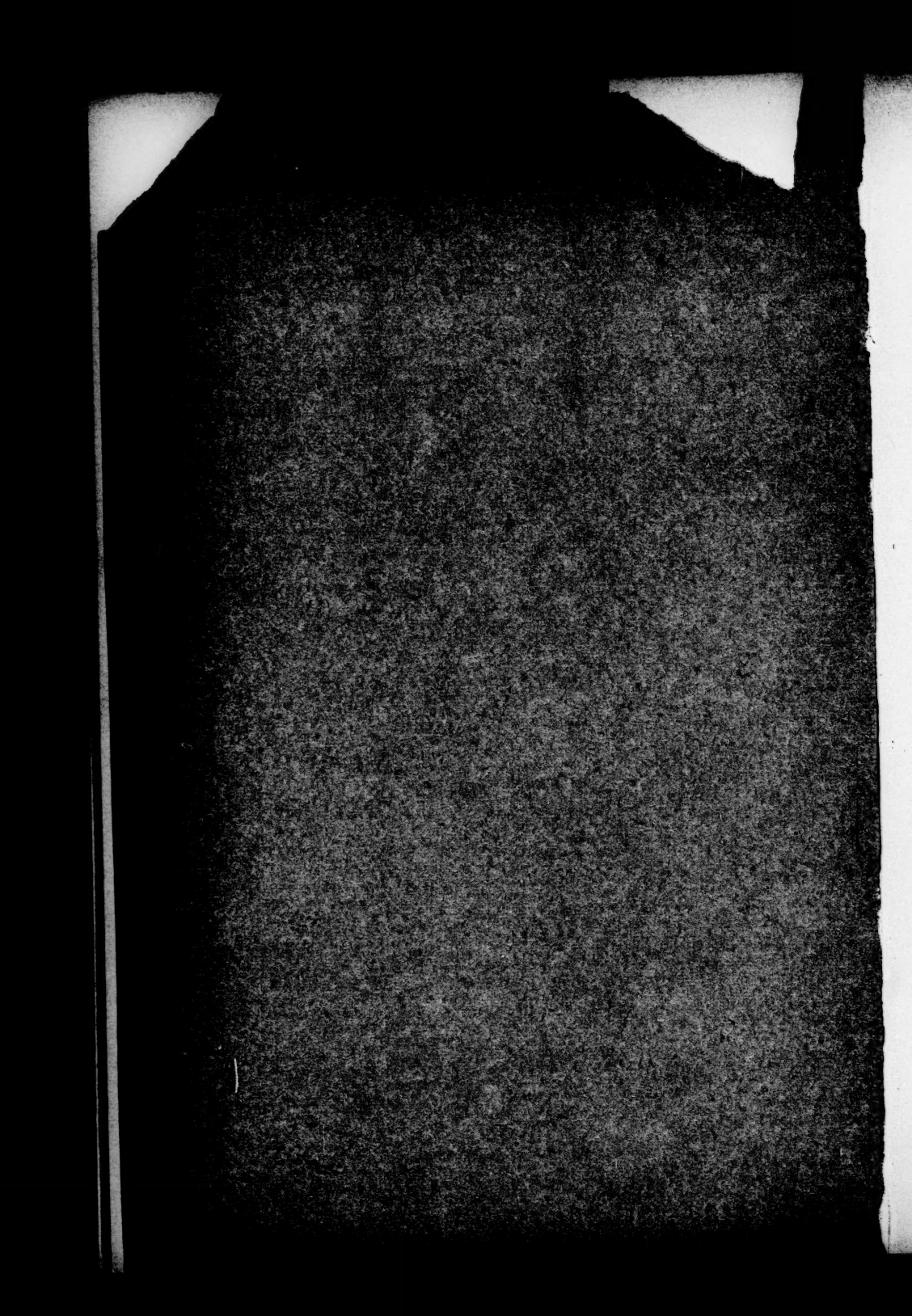
H. G. BEASON,

Sheriff of Oneida County, Idaho Territory.

BRIEF FOR APPELLANT.

FRANKLIN S. RICHARDS,
JEREMIAH M. WILSON,
SAMUEL SHELLABARGER,
For Appellant.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.



Supreme Court of the United States.

OCTOBER TERM, 1889.

SAMUEL D. DAVIS, APPELLANT,

v.

H. G. BEASON, SHERIFF OF ONEIDA COUNTY, IDAHO TERRITORY.

No 1261.

BRIEF FOR APPELLANT.

This is an appeal from a final order and judgment of the District Court of the Third Judicial District of Idaho Territory, upon a writ of *habeas corpus* duly issued out of said court for the production of the body of the petitioner, Samuel D. Davis, by which said order the said petitioner was remanded to the custody of said sheriff of Oneida county, Idaho Territory, and is still held in custody by him. The petitioner, by his petition and exhibits thereto annexed, (Record, pages 1 to 9), prayed to be discharged from custody on the judgment and sentence rendered and imposed by the said District Court for the Third Judicial District of Idaho Territory on the 12th day of September, 1889. (Record, p.

6). The petition for a writ of *habeas corpus* was presented on the 12th day of September, 1889, and the writ issued on the same day. The hearing thereon was had September 12, 1889, and the order remanding the petitioner to the custody of the sheriff was made on the same day. (Record, pp. 6, 7, 8, and 9). An appeal to this Court was allowed by the District Court and perfected on the said 12th day of September, 1889. (Record, pp. 9 and 10). The appeal was taken pursuant to section 1909 of the Revised Statutes of the United States, which reads as follows:

"SEC. 1909. Writs of error and appeals from the final decisions of the Supreme Court of either of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decisions of the Supreme Courts created by this Title, or of any judge thereof, or of the District courts created by this Title, or of any judge thereof, upon writs of *habeas corpus*, involving the question of personal freedom."

STATEMENT OF THE CASE.

On the 12th day of September, A. D. 1889, the appellant, Samuel D. Davis, was convicted in the District Court of the Third Judicial District of the Territory of Idaho, on an indictment for conspiracy, found and presented in said court on the 8th day of April, A. D. 1889, which said indictment charged that the said Samuel D. Davis and sundry other persons therein named, and divers persons whose names were to the grand jury unknown, "on the 27th day of October,

A. D. 1888, at the county of Oneida, in the Territory of Idaho, did unlawfully, wickedly, maliciously, and corruptly conspire, combine, confederate, and agree together, unlawfully, to commit acts for the perversion and obstruction of the due administration of the laws of Idaho Territory, which acts they then and there so conspired to commit were that they each and all should then and there unlawfully and wilfully procure themselves, each and all and each other, unlawfully to be admitted to registration as electors of said Oneida county for the general election then next to ensue in said Oneida county, and Idaho Territory, when they each and all were not entitled to be admitted to such registration under the laws of Idaho Territory; and they and each of them did thereafterwards, to wit, on the 27th day of October, A. D. 1888, in pursuance of and according to said conspiracy, combination, confederacy, and agreement together as aforesaid, unlawfully and wilfully cause and procure themselves, each and all and each other, unlawfully to be admitted to registration as electors of said county for said election by then and there each personally appearing before the respective registrars of the election precincts of said county, in which they, namely, the said persons so conspiring, respectively resided, and then and there taking and causing to be duly administered to them by the said registrars, respectively, the elector oath prescribed by the statute of said Territory in such case made and provided (the said registrars being then and there each duly authorized to administer said oath), in substance as follows:

"I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one (21) years (or will be on the 6th day of November, 1888); that I have (or will have) actually resided in this Territory four months, and in this county for thirty days next preceding the day of the next ensuing election; that I have never been con-

victed of treason, felony, or bribery; that I am not registered or entitled to vote at any other place in this Territory, and I do further swear that I am not a bigamist or polygamist; that *I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy or any other crime defined by law as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of said organization;* that I do not, and will not publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof, and the laws of this Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God.

"When in truth and in fact *they and each of them were then and there members of an order, organization, and association, namely, the Church of Jesus Christ of Latter-Day Saints, then and there otherwise and commonly known as the Mormon Church*, which, as each and all of them then and there well knew, taught, advised, counselled, and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization, and association, and which said order, organization, and association, as they each and all then and there well knew, practiced bigamy and polygamy and plural and celestial marriage as doctrinal rites of said organization;" and that in pursuance of and according to said conspiracy, combination, confederacy, and

agreement together as aforesaid, in taking the said oath, the said Samuel D. Davis and others appeared before certain registration offices named in the indictment and then and there took and had administered to them the oath aforesaid.

Upon said conviction by the District Court for the Third Judicial District of the Territory of Idaho, on the 12th day of September, 1889, the appellant was sentenced and adjudged to pay a fine of $500 and, in default of the payment of said fine to be imprisoned in the county jail of the county of Oneida for a term not exceeding 250 days, and he was remanded to the custody of the sheriff of Oneida county until the judgment was satisfied.

Ever since said last-named date the appellant has been and now is imprisoned in the jail of Oneida county in the Territory of Idaho, under and in pursuance of the aforesaid judgment and order of the said District Court.

On the 12th day of September, 1889, the appellant sued out a writ of *habeas corpus* from the said Third District Court, alleging that his imprisonment and restraint were illegal, and that said illegality consisted in that:

"1. The facts in said indictment and record do not constitute a public offence, and the said acts charged therein are not and were not criminal or punishable under any statute or law of said Territory.

"2. So much of the statutes of said Territory which provides that no person is entitled to register or vote at any election who is 'a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy or any other crime defined by law as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization' is a 'law respecting

an establishment of religion,' in violation of the first amendment to the Constitution, and void."

Upon the hearing on said petition and writ of *habeas corpus* the said District Court decided adversely to the appellant's right to be discharged and remanded him to the custody of the sheriff of Oneida county, Territory of Idaho, who now has him imprisoned under the aforesaid judgment.

This prosecution arose and was instituted under the following sections of the Revised Statutes of Idaho, 1887, viz:

"SEC. 501. No person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery in the Territory, or in any other State or Territory in the Union, unless restored to civil rights, nor any person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or *who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory.*"

"SEC. 504. * * * The Registrar must, before he registers any applicant, require him to take and subscribe the oath, to be known as the 'elector oath,' which is as follows:

"I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one (21) years (or will be on the day of , 18—, naming date of next succeeding election). That I have (or will have) actually resided in this Territory for four (4) months and in this county for thirty (30) days next preceding the day of the next ensuing election (in case of any election requiring different time of residence so make it). That I have never

been convicted of treason, felony, or bribery; that I am not now registered or entitled to vote at any other place in this Territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not, and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof, and of this Territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding (when made before a judge of election add 'and I have not previously voted at this election'), so help me God."

The Statute of Idaho in relation to conspiracy, under which this indictment was found, is as follows:

"SEC. 6540. If two or more persons conspire:

"1. To commit any crime;

"2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

"3. Falsely to move or maintain any suit, action, or proceeding;

"4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretences, or

"5. To commit any act injurious to the public health, to public morals, or *for the perversion or obstruction of justice or the due administration of the laws;* they are punishable

by imprisonment in the county jail, not exceeding one year, or by fine not exceeding one thousand dollars, or both."

Assignment of Errors.

1. The Court erred in refusing to discharge the appellant upon the writ of *habeas corpus* and in remanding him to the custody of the sheriff.

2. The Court erred in holding that the facts stated in appellant's petition did not show sufficient cause for his discharge.

3. The Court erred in not holding that so much of the statute of Idaho Territory as provides that no person "who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory," and that no person is entitled to register at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization," is unconstitutional and void.

Question arising on the Appeal.

Are those clauses in the statutes of Idaho which provide that no person "who is a member of any order, organization or association which teaches, advises, counsels or en-

courages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, *is permitted to vote at any election, or to hold any position of honor, trust or profit within this Territory*," and that no person is entitled to register or vote at any election within that Territory, who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite ofsuch organization," valid laws, or are they in violation of the Constitution of the United States, and therefore void?

JURISDICTION.

Had it not been for these particular provisions in the Idaho statute, no such prosecution as this could ever have been instituted, and the appellant would not have been imprisoned. If these provisions are unconstitutional, the Court had no jurisdiction to try him, and his confinement is illegal. Hence, the validity of the law is the real question to be determined in the case.

"The power of Congress (or the legislative assembly of a Territory) to pass a statute under which a prisoner is held in custody may be enquired into under a writ of *habeas corpus* as affecting the jurisdiction of the Court which ordered his imprisonment. And if the want of power appears, the Court which has authority to issue the writ is bound to release him."

Hans Nielsen's Case, 131 U. S., 183.

In Re Coy, 127 U. S., 758.
Ex Parte Siebold, 100 U. S., 376–7.
In Re Snow, 120 U. S., 274.
Ex Parte Lang, 18 Wall., 163.

ARGUMENT.

THE LEGISLATURE OF IDAHO COULD NOT LEGALLY PRESCRIBE THAT A MAN WHO HAS NEVER COMMITTED ANY CRIME SHOULD NOT HAVE THE RIGHT TO REGISTER AND VOTE, OR HOLD OFFICE, BECAUSE HE BELONGS TO A CHURCH ORGANIZATION THAT HOLDS OR TEACHES BIGAMY AND POLYGAMY AS A DOCTRINE OF THE CHURCH, MEMBERSHIP IN SUCH ORGANIZATION NOT HAVING BEEN BY LAW MADE A CRIME.

The appellant was indicted for conspiring with others to procure themselves to be registered, by taking the registration oath, which requires the elector to swear or affirm—

1. That he is a male citizen of the United States.
2. That he is 21 years of age.
3. That he has resided in the Territory 4 months and in the county 30 days.
4. That he has never been convicted of treason, felony, or bribery.
5. That he is not registered or entitled to vote at any other place in the Territory.
6. That he is not a bigamist or polygamist.
7. That he is not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization.

8. That he does not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise.

9. That he regards the Constitution of the United States and the laws thereof, and the laws of Idaho Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding.

It is averred that the defendant took this oath. It is not denied, and consequently is admitted, that he had the qualifications of citizenship, age, and residence; he was not under the disability of any conviction for treason, felony, or bribery; he was not registered or entitled to vote at any other place; he was not a bigamist or polygamist; he did not and would not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit bigamy or polygamy, nor any other crime, and *he regarded the Constitution and laws, as interpreted by the courts, as the supreme law of the land, any teachings of the church to the contrary notwithstanding.*

It is only claimed that he belonged to the Mormon Church, which, the indictment charges, taught, advised, counselled, and encouraged its members and devotees to commit bigamy and polygamy, as duties arising and resulting from membership in such church.

This raises the only question in the case:

Could the appellant be disfranchised and disqualified from holding office because of his membership in the Mormon Church?

We answer, *No.* Such legislation is forbidden by the Constitution of the United States.

I.

THE IDAHO STATUTE DISFRANCHISING AND DISQUALIFYING CITIZENS FROM HOLDING OFFICE BECAUSE OF MEMBERSHIP IN THE MORMON CHURCH IS UNCONSTITUTIONAL AND VOID, BECAUSE IT PROHIBITS "THE FREE EXERCISE OF RELIGION."

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Constitution, Art. 1, Amendments.

The provisions of the statute of Idaho, which provide that no person who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory," and that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization," are in violation of this article of the Constitution, and therefore void.

This court has held that "religious freedom is guaranteed everywhere throughout the United States so far as Congressional interference is concerned," (98 U. S., 162,) and that "Congress cannot pass a law for the government of Territories which shall prohibit the free exercise of re-

ligion." (*Ibid*, 162.) It necessarily follows that a Territorial legislature cannot pass such a law. In the language of this court, "Congress could confer no power on any local government established by its authority, to violate the provisions of the Constitution." (19 How, 450.) Section 1891 of the Revised Statutes of the United States provides that:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

This inhibition against prohibiting the free exercise of religion brings the inquiry whether prohibition of membership in a church, or disfranchisement because of such membership, is a prohibition of the "free exercise of religion."

The Constitutional guaranty involves more than mere opinion and belief. It not only protects a man in the enjoyment of his religious opinions, but also in the free exercise of religion. This free exercise of religion must embrace his right to enjoy the benefits of a church, to worship according to its forms and ceremonies, to participate in its ordinances and partake of its sacraments, and this he could not do without being a member of the church organization. It does not necessarily follow from such membership that he must believe all the dogmas or doctrines of the church. He may disbelieve any or even all of them, but its ceremonies, forms, and associations may be of such a character as comport with his ideas of worship and duty to his Creator. No matter what his belief is, if he violates no law, he may freely exercise his religion according to such forms and ceremonies. If he cannot, he is deprived of the free exercise of religion. This must be so, otherwise the words of the Constitution, "or prohibiting

the free exercise thereof" are surplusage and without meaning. It requires no such declaration as this to secure only freedom of opinion and belief.

The appellant violated no law. He did not practice bigamy or polygamy, nor did he advise anyone else to do so. It does not appear that he even believed in these practices, and certainly he repudiated them by his oath. He simply belonged to the Mormon Church and claimed his right to worship in that church. This act undertakes to say that he shall not do this without forfeiting his franchise, one of the most sacred rights of citizenship.

This is equivalent to saying that he shall not belong to that particular church, nor worship within it, because of its doctrines on a certain subject, although he is not bound to and may not believe them. He may join any other church, may have the same religion and exercise it in any other church, but not in this one.

Thus far we have proceeded upon the hypothesis that, since there is nothing in the record to show what the appellant really did believe, he may have become a member of the church and worshipped in it according to its methods without believing in these doctrines, and for such worship he could not be constitutionally deprived of his franchise.

But suppose he did believe in bigamy and polygamy, and associated and worshipped with others who believed with him, or he with them, in a church organization. Can he be disfranchised because of this belief?

It will not do to say that he is disfranchised, not because of his belief, but because of his membership in the church. That would be sticking in the bark, because some reason must be found for saying that he shall not belong to such a church, and that reason, as cannot be disguised, is belief in its doctrines as to bigamy and polygamy. Therefore this is disfranchisement on account of belief. "Laws are made

for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." (98 U. S., 166.)

In the Reynolds case (98 United States, 164) this Court held that "Congress was deprived of all legislative power over mere opinion," that it "was left free to reach *actions* which were in violation of social duties or subversive of good order," but that it could not "prohibit the free exercise of religion." (*Ibid*, 162.) The question before the Court in that case was, whether a man who had entered into a plural marriage could claim exemption from punishment because he had done so from a sense of religious duty. The Court held that, while he was protected in his belief, he was liable to punishment for the practice, and it endorsed the declaration, "that *it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.*"

98 United States, 163.

The appellant might safely rest his case on this definition, for, as we have already shown, he has been guilty of no "overt act against peace and good order," because mere membership in the church is not an overt act against *peace and good order*. But the importance of the subject demands a more extended inquiry into the meaning of the terms "religion" and "the free exercise thereof." The Constitution has not defined these terms, nor have they been fully expounded by this Court. We therefore invite the attention of the Court to some popular definitions that may throw light on this subject:

Religion.

"*Religion* means the conscious relation between man and God, and the *expression of that relation in human conduct.*"
Religious Encyclopædia or Dictionary. Schaff–Herzog.

"*Religion* in Christian countries is generally understood as the feeling of reverence toward the Creator and Ruler of the world, *together with all those acts of worship and service to which that feeling leads.* The root of this sentiment lies in the very constitution of man."
The New People's Cyclopædia of Universal Knowledge, vol. 3.

"*Religion*, in the widest reach of the word, comprehends *all frames of feeling, all forms of faith and acts of worship*, to which man is impelled by his fears or drawn by his hopes toward superhuman beings and powers or their visible representatives. It originates in his nature and circumstances, and is as early in its manifestations, as constant in its character, as universal in its influence, as any sentiment or principle of action marking the history of man."
Johnson's Universal Cyclopædia, vol. 6.

"In all forms of *religion* there is one part which may be called the *doctrine* or dogma, which is to be received by faith; and the *cultus* or worship, *which is the outward expression of the religious sentiment.* By religion is also meant that homage to the Deity in all the *forms* which pertain to the spiritual life, in contrast with theology, the theory of the divine nature and government.
McClintock & Strong's Cyclopædia of Biblical, Theological, and Ecclesiastical Literature, vol. 8.

Religious Liberty.

"*Entire freedom of creed, thought, and worship*, perfect equality of all religious associations, and a protection of

each from the domination of the other is what is meant by religious liberty. * * * In the United States religious liberty is a *personal* right, the principle being fundamental that what is religious is of necessity beyond the reach of Government."

The New People's Cyclopædia of Universal Knowledge, vol. 2.

"The distinction is quite clear and broad between what is civil and what is religious. Civil Government is not to support or hinder any form of religion. Privileges are not to be granted nor any injuries to be inflicted because of religious belief. * * * *The State cannot go behind the overt act.* Religion looks to the posture of the mind and the heart. Men are bound to submit their judgment on points of faith to no visible body. *Religious liberty* is absolute freedom of religious *opinion and worship*, the equality of all churches, religious associations, or persons in the way of protection and restraint by the legally expressed will of the nation."

Johnson's Universal Cyclopædia, vol. 4.

"*The free exercise and enjoyment of religious profession and worship* may be considered as one of the *absolute rights of individuals*, recognized in our American Constitutions, and secured to them by law. Civil and religious liberty generally go hand in hand, and the suppression of either of them, for any length of time, will terminate the existence of the other."

2 Kent's Commentaries, 35.

"*Among the first of civil rights is that of enjoying religious freedom.* If this is complete, as it is supposed to be in this country, it implies two things: 1. The right freely to render *adoration and worship* to the Supreme Being in the manner indicated by the belief, and according to the dictates of the individual conscience; and 2. The right to be exempt from exactions in support of the worship of others."

Cooley on Torts, page 33.

It is evident from the foregoing standard authorities that religious liberty is a right embracing more than mere opinion, sentiment, faith, or belief. It includes all "*human conduct*" that gives expression to the relation between man and God; it includes "all frames of feeling, all forms of faith, and *acts* of worship" to which man is impelled by his hopes or fears; it includes the "*cultus*" or "outward expression of the religious sentiment;" it means "entire freedom of creed, thought, and worship," with a restriction upon the Government that it "cannot go behind the *overt act;*" in other words, it includes all acts of manifestation or exercise of religion which are not in violation of "peace and good order." 98 United States, 163.

That the term "free exercise of religion" was intended by the promoters of the first article of amendment to the Constitution to have this broad and comprehensive signification is apparent from an examination of the history of that period, to which this court said we should look for the meaning of the term, and, in the Reynolds case, *supra*, pages 162, 163, 164, it gave an epitome thereof as follows:

"Before the adoption of the Constitution attempts were made in some of the colonies and States to legislate, not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784 the House of Delegates of that State, having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and dis-

tributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of the assembly.'

"This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. (Semple's Virginia Baptists, Appendix.) At the next session the proposed bill was not only defeated, but another 'for establishing religious freedom,' drafted by Mr. Jefferson was passed. (1 Jeff. Works, 45; 2 Howison's Hist. of Va., 298). In the preamble of this act (12 Hening's Stat., 84) *religious freedom is defined;* and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and *to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,*' it is declared 'that *it is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.*' IN THESE TWO SENTENCES IS FOUND THE TRUE DISTINCTION BETWEEN WHAT PROPERLY BELONGS TO THE CHURCH, AND WHAT TO THE STATE.

"In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as Minister to France. As soon as he saw the draft of the Constitution proposed for adoption he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations (1 Jeff. Works, 79). Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined

to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed, with others, by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. *Mr. Jefferson* afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 Jeff. Works, 113), *took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.'*

"Coming as this does from the acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free *to reach actions* which were in violation of social duties or subversive of good order."

In the foregoing opinion the Court adopts the definition of "religious freedom" given in the preamble of the Virginia act drafted by Mr. Jefferson, "for establishing religious freedom." We quote the entire act:

AN ACT FOR ESTABLISHING RELIGIOUS FREEDOM.

Whereas Almighty God has created the mind free; that all attempts to influence it by temporal punishments or

burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in His almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and his withdrawing from the ministry those temporary rewards, which proceeding from the approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that, therefore, the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, *unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it;* that though indeed those are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the approbation or propagation of principles on supposition

of their ill-tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being, of course, judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.

"That it is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and, finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition, disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

"*Be it enacted by the General Assembly*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

"And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, has no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

12 Henning's Statutes, 84, 85, 86.

Concerning this act Mr. Jefferson wrote:

"The bill for establishing religious freedom, the principle of which had, to a certain degree, been enacted before, I had drawn in all the latitude of reason and right. It still met with opposition; but, with some mutilation in the preamble, it was finally passed; and a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares that coercion is a departure from the plan of the Holy Author of our religion, an amendment was proposed, by inserting the words 'Jesus Christ,' so that it should read, 'a departure from the plan of Jesus Christ, the Holy Author of our religion;' the insertion was rejected by a great majority, in proof that *they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and infidel of every denomination.*"

1 Jefferson's Works, 45.

These are significant words, coming as they do from the man who did more than any other person to establish religious freedom in this country, and who has been cited by this Court as an exponent of the Constitutional provision guaranteeing the free exercise of religion. But he was not alone in these opinions. George Washington entertained the same exalted views of our great charter of human liberty. In his announcement of the treaty of peace to the army he said:

"Happy, thrice happy, shall they be pronounced hereafter, who shall have contributed anything, who have performed even the meanest office in erecting *this stupendous fabric of freedom and empire on the broad basis of independency, who have assisted in protecting the rights of human nature and establishing an asylum for the poor and oppressed of all nations and religions.*"

8 Writings of Washington, 568.

This asylum, then, was not for believers in any particular religion; it was not the special refuge of the favored Christian, but it was the asylum of the oppressed of all nations.

By the word "religion" in the Constitution is not meant "Christianity" or the "Christian religion," or any other form or system of religion. Christianity is no part of the law of the land; all systems are equal before the law.

Board of Education *v.* Minor, 23 Ohio St., 211.

Attorney General *v.* Brow, 58 Mich., 213.

The following provisions from the Constitutions of some of the original States show the popular idea of religious freedom which prevailed among the colonies, and so they are in place here.

Article 56, Constitution of Georgia, 1777:

"All persons whatever shall have *the free exercise of their religion*, provided it be not repugnant to the peace and safety of the State."

1 Charters and Constitutions, 383.

Article 33, Declaration of Rights, Maryland, 1776:

"As it is the duty of every man to *worship God* in such manner as he thinks most acceptable to him, *all persons* professing the Christian religion are *equally entitled* to protection in their *religious liberty*."

Ibid., 809.

Article 3, Declaration of Rights, Massachusetts, 1780:

"*Every denomination* of Christians *demeaning themselves peaceably*, and as good subjects of the Commonwealth, shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law."

Ibid., 957.

Article 18, Constitution of New Jersey, 1776:

"No person shall ever, within this colony, be deprived of the inestimable privilege of *worshipping Almighty God* in a manner agreeable to the dictates of his own conscience."
2 Charters and Constitutions, 1313.

Article 34, Constitution of North Carolina, 1776:

"All persons shall be at liberty to exercise their own mode of worship."
Ibid., 1414.

Article 38, Constitution of New York, 1777:

"And whereas we are required, by the benevolent principles of national liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind; this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that *the free exercise and enjoyment of religious profession and worship*, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind."
Ibid, 1338.

Article 5, Bill of Rights, New Hampshire, 1784:

"Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason; and no subject shall be hurt, molested, or restrained in his person, liberty, or estate *for worshipping God*, in the manner and season most agreeable to the dictates of his own conscience, or *for his religious profession, sentiments, or persuasion;* provided he doth not disturb the public peace, or disturb others in their religious worship."
Ibid, 1281.

Article 11, Declaration of Rights, Pennsylvania, 1776:

"That all men have a natural and inalienable right to worship God Almighty according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and that no authority can or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control, *the right of conscience in the free exercise of religious worship.*"

Ibid, 1541.

Section 16, Virginia Bill of Rights, 1776:

"That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to *the free exercise of religion according to the dictates of conscience;* and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."

Ibid, 1909.

A circumstance connected with the history of the section last quoted gives an exact idea of Mr. Madison's view as to the power of the Government over religion. The clause was originally drafted by Colonel George Mason, and contained the words: "All men should, therefore, enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society." Mr.

Madison thought there was a dangerous implication in the use of the word *toleration*, and that the clause restraining the civil magistrate in cases where the peace of society might be supposed to be endangered was not sufficiently guarded. Toleration might be construed to imply the granting of liberty of worship as a grace, instead of as a right, and the other provision might be made the pretext for interference with religion. He, therefore, prepared an amendment declaring that—

"All men are equally entitled to the full and free exercise of religion according to the dictates of conscience, and *no man, or class of men, ought, on account of religion, to be* invested with peculiar emoluments or privileges, *nor subjected to any penalties or disabilities unless, under color of religion, the preservation of equal liberty and the existence of the State are manifestly endangered.*"

And here we have an authoritative exposition of religious liberty from Mr. Madison, the man who, along with Mr. Jefferson, was instrumental in securing that sacred heritage.

Following is the proposed amendment to the Federal Constitution offered by Virginia and North Carolina:

"That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural and unalienable right to *the free exercise of religion* according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others."

3 Elliot's Debates, 659; 4 Elliot's Debates, 244.

The charter of Rhode Island of 1663, reflecting the principles of its illustrious founder, Roger Williams, established a freedom of religious opinion and worship which pre-

served the rights and sanctity of conscience with extraordinary liberality for that early period of New England history. It declared:

"No person within the colony, at any time hereafter, shall be in anywise molested, punished, disquieted or called in question for any differences in opinion in matters of religion *who does not actually disturb the civil peace of the colony.*"

2 Kent's Commentaries, 35.

The legislature of Maryland had already, in 1649, declared by law that no persons professing a belief in Jesus Christ should be molested *in respect to their religion or in the free exercise thereof*, or be compelled to the belief or exercise of any other religion against their consent. In relation to this subject Chancellor Kent says:

"The Catholic planters of Maryland procured to their adopted country the distinguished praise of being the first of the American States in which toleration was established by law; and while the Puritans were persecuting their Protestant brethren in New England, and the Episcopalians retorted the same severity on the Puritians in Virginia, the Catholics, against whom the others were combined, formed in Maryland a sanctuary, where all might worship and none might oppress, and where even Protestants sought refuge from Protestant intolerance.

"The proprietaries of Carolina, for the better encouragement of settlers, declared concurrently in the point of time with the Rhode Island charter, that all persons settling therein should enjoy the *most perfect freedom in religion.*

"So, also, Lord Berkley and Sir George Carteret, the proprietaries of New Jersey, in their first concessions to the settler in 1664, of a charter of civil liberties secured to them the *full and perfect enjoyment of religious liberty*, by adopting the same language as that used in the charter of Rhode Island. The fundamental constitutions of the twenty-

four proprietaries in 1683 reiterated the right to the same unqualified *freedom of religious profession and worship.*

"In the code of laws or charter of privileges prepared by William Penn, for Pennsylvania, and adopted by the first provisional assembly, it was declared that no person acknowledging a Deity, and living peaceably and justly in society should be molested or prejudiced *for their religious persuasion or practice in faith and worship.*

"It appears from these illustrious examples that various portions of this country became, even in its infant state, *distinguished asylums for* the enjoyment of the principles of *civil and religious liberty*, by the persecuted votaries of these principles from every part of Europe."

2 Kent's Commentaries, 35–37.

It is evident from the foregoing that the colonial idea of religious freedom did not consist in the preservation of the right to entertain opinion or belief merely, but in securing the right to a "free exercise of religion, according to the dictates of conscience;" and this included "*practices*" as well as faith and worship, so long as they did not "actually disturb the civil peace of the colony." There can be no doubt that this is the "free exercise of religion" which our patriot fathers intended to secure to their posterity, and it is what we are contending for in this case.

Writing about the first article of amendment to the Federal Constitution, soon after its adoption, St. George Tucker, in referring to the section above quoted, says:

"Our State Bill of Rights contains what, if prejudice were not incapable of perceiving truth, might be deemed an axiom concerning the human mind. That 'religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence.' In vain, therefore, may the civil magistrate interpose the authority of human laws to prescribe that belief or produce that conviction which human reason rejects; in vain may the secular arm be extended, the rack stretched,

and the flames kindled to realize the tortures denounced against unbelievers by all the various sects of the various denominations of fanatics and enthusiasts throughout the globe. The martyr at the stake glories in his tortures, and proves that human laws may punish but cannot convince. The pretext of religion and the pretences of sanctity and humility have been employed throughout the world as the most direct means of gaining influence and power. Hence the numberless martyrdoms and massacres which have drenched the whole earth with blood from the first moment that civil and religious institutions were blended together. *To separate them by mounds which can never be overleaped* is the only means by which our duty to God, the peace of mankind, and the genuine fruits of charity and fraternal love can be preserved or properly discharged. *This prohibition, therefore, may be regarded as the most powerful cement of the Federal Government, or rather the violation of it will prove the most powerful engine of separation. Those who prize the union of the States will never think of touching this article with unhallowed hands.* The ministry of the unsanctified sons of Aaron scarcely produced a flame more sudden, more violent, or more destructive than such an attempt would inevitably excite."

1 Tucker's Blackstone, Appendix, 296–7.

And further, on the same subject, this able writer says:

"Liberty of conscience in matters of religion consists in *the absolute and unrestrained exercise of our religious opinions and duties, in that mode which our own reason and conviction dictate,* without the control or intervention of any human power or authority whatsoever. * * * Not only all Christians, but all men of all religions, ought to be considered as equally entitled to protection, as far as they demean themselves honestly and peaceably. * * * This inestimable and imprescriptible right is guaranteed to the citizens of the United States, as such, by the Constitution of the United States, which declares that no religious test shall ever be required as a qualification for any office or public trust under the United States; and by that amendment to

the Constitution which prohibits Congress from making any law respecting the establishment of religion, or prohibiting the free exercise thereof."

2 Tucker's Blackstone, Appendix, 4, 6, 10.

Here we have the words of one who was nurtured in the very cradle of liberty, telling us that this constitutional guaranty is no idle pledge, but that it secures "the absolute and unrestrained exercise of our *religious opinions and duties*, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatever," and that "*all men of all religions*" are "equally entitled to protection, as far as they demean themselves honestly and peaceably." What language could be plainer than this? And who better qualified to speak upon this important subject than one who was at the time an eminent expounder of constitutional law in the new republic.

Leaving the dusty annals of the last century, we come now to the testimony of the great commentator on the Constitution and find that he does not differ from the others in his interpretation of the guaranty of religious liberty. He says:

"*The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion.*"

2 Story on the Constitution, Sec. 1876.

"It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the National Government all power to act upon the subject. The situation, too, of the

different States equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the National Government were left free to create a religious establishment. The only security was in extirpating the power. *But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition of all religious tests.*"

2 Story on the Constitution, Sec. 1879.

In enumerating "those things which are not lawful under any of the American Constitutions," Mr. Cooley says:

1. "*Any law respecting an establishment of religion.* The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution, and, if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege."

"4. *Restraints upon the free exercise of religion according to the dictates of the conscience.* No external authority is to place itself between the finite being and Infinite when the former is seeking *to render the homage* that is due, and *in a mode which commends itself to the conscience and judgment* as being suitable for him to render and acceptable to its object."

"5. *Restraints upon the expression of religious belief.* An earnest believer usually regards it as his duty to propa-

gate his opinions and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation."

Cooley's Con. Lim., 469–70.

It will be seen from the foregoing that all the authorities agree in sustaining the view that "the free exercise of religion" means more than mere opinion or belief, and that it may include "acts" and "practices" not prohibited by law. The constitutional inhibitions cited by Mr. Cooley apply as well to the legislative power of a Territory as to that of Congress, and they are both restrained within the limits of the Constitution. This Court has said: "No one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion or the free exercise thereof." 19 How., 450.

It will hardly be pretended that Congress could say a man should not vote in a Territory if he worshipped according to the forms and ceremonies of the Methodist Church, or those of any other church, nor because he was a member of any particular church that entertained a certain belief, nor because he held any particular opinion on religious subjects. Surely Congress could not do this without violating the provisions guaranteeing the right to the free exercise of religion. It has often been decided that Congress cannot do by indirection what it is not permitted to do directly.

This Court has held that "deprivation of civil or political rights may be punishment," and if Congress should enact that a man otherwise qualified should not vote if he entertained a particular religious belief, or if he belonged to a church that entertained that belief, it would be punishment prescribed for the purpose of coercing his action in respect of that as to which the Constitution guarantees him absolute freedom.

It is no answer to this to say that the creed or doctrines of this Church teach polygamy as a duty. It may never be practiced, notwithstanding the teachings, and if not practiced the exclusion is only because of expressed opinion—expressed in speech or through the press, freedom as to both of which is guaranteed by the Constitution. He has a right to believe that polygamy is divinely ordained, that it was right in the patriarchal days and is no less right now, but this Court has said that he enjoys this right of opinion subject to the right of the government to punish him if he puts that belief into practice. This is the extent to which Congress can go and no further. If a man believes in polygamy and teaches it, or belongs to a church that teaches it, he is not to be punished or deprived of any privilege accorded to others because of that belief or teaching; he is only amenable to the law and liable to its penalties when he becomes guilty of the offence of bigamy or polygamy.

To disfranchise him when he has not committed any offence, simply because he belongs to a church that teaches bigamy and polygamy, and some of whose members practice it, is to punish him for the overt acts of other persons, over whom he could exercise no control. No one can be thus made responsible for the conduct of his associates, and to attempt it is an exercise of arbitrary power.

We have already shown that if Congress cannot do this a territorial legislature is equally restricted. But the Idaho act has said that a citizen who has not committed polygamy, or any other offence, and has done nothing more than to belong to the Mormon Church, which church, as an organization, is alleged by this indictment to not only teach but "practice" polygamy, shall not vote or hold office.

An illustration will serve to show the vice of this enactment. It is a fact so well known that the Court may take judicial notice of it, that the vast majority of the members

of this Church never were in the polygamous relation. Children of monogamic parents are born in the Church and become members at an early age. A young man who never even had one wife reaches the age of 21 years and presents himself for registration as a voter. This act denies him that right on the sole ground that he is a member of that Church. Or a man who belongs to the Church and has exhibited every quality of good citizenship through a long and honorable life, finds himself disfranchised by this act, not because he has ever lived in polygamy, nor because he has committed any other offence, but solely because he belongs to this particular Church organization. Congress has never ventured so far in its legislation. The able men who have been dealing with the "vexed question" for years have not felt that such enactments could be justified. They are too arbitrary and too nearly akin to the persecutive measures of the dark ages to find advocates in the National legislature of a free country.

By section 8 of the so-called "Edmunds Act," entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March 22, 1882, Congress enacted:

"That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

22 Statutes, 31.

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22 Statutes, 31.

In 1886, when the so-called "Edmunds-Tucker Bill," which amends the act of 1882, was under discussion in the Senate, Mr. Hoar said:

"Why does not the honorable Senator from Vermont come out and say frankly that no *Mormon*, no man who *believes* in plural marriages, no Mormon elder, no teacher in that Church shall be clothed with the suffrage?"

To which Mr. Edmunds replied:

"Mr. President, my friend from Massachusetts inquired why I do not come out frankly and say that I want to deprive a Mormon of the right of voting because he believes in certain things that I believe to be criminal. I do come out frankly and say that I am not in favor of anything of the kind. This bill and the bill that preceded it and other bills that very likely will follow this until the practice of polygamy is extirpated and it is admitted to be a dead and gone thing, *are not based upon the idea of in any manner interfering with the opinions or beliefs of anybody.*"

Cong. Rec., vol. 17, part 1, 1886, p. 407.

On a subsequent day, to which the debate was adjourned, Mr. Edmunds, in explaining the provisions of the bill, said:

"These trustees have nothing to do with Church government or discipline. They have no control over or influence upon any part of the faith or doctrine of the Church, and we do that *upon the universally recognized principle that we would not undertake to interfere with anybody's faith or doctrine or worship.*" * * *

"No one of these trustees and assistant trustees now under the law, supposing it to be in force, has the slightest control or influence over any part of the operations of the *Church as a church as to matter of doctrine and discipline, and worship, as it is understood among men.*

Ibid, 560.

Speaking of the anti-polygamy act of 1862, he said:

"It is perfectly plain to my mind that the Congress of the United States did not interfere or intend to interfere with the existence of the Church of Jesus Christ of Latter-day Saints as a religious corporation for purposes of worship and doctrine."

Ibid.

Again, speaking of the proposed trustees and all the time repudiating any right to interfere with the doctrine or worship of the Church, Mr. Edmunds said:

"They are given no authority to do anything or to say anything concerning *the faith, worship, or doctrine of that Church.* Therefore when we interfere with that section regarding trustees, we do not interfere with anything that relates to anybody's religious belief of any kind, be it good or bad."

The fact that in this act Congress did not extend the disqualification for voting and holding office, but left it to apply only to actual bigamists and polygamists, shows that this was as far as Congress was willing to go, and it is certainly persuasive that it is as far as Congress deemed it had the power to go.

If Congress could go no further, a territorial legislature could not go further.

In this same legislation that disfranchises bigamists and polygamists Congress has said that there shall be no interference with opinion, thus drawing sharply the line between opinion and acts—recognizing the right to have an opinion, but prescribing punishment for overt acts done pursuant to that opinion—declaring, as this Court has declared, that acts in violation of law cannot be justified by the plea that they were committed in "the free exercise of religion."

From the foregoing it conclusively appears that a man may entertain any religious opinion, belief, faith, or sentiment he chooses, and there is no civil power or authority that can in any way, directly or indirectly, restrain or interfere with that opinion, nor deprive him of any of the rights or privileges of citizenship because thereof.

It is equally clear that he may, in "the free exercise of his religion," worship "according to the dictates of his conscience," and perform such "acts," and engage in such "practices" as he may deem "most acceptable to his Creator," provided he commits no criminal offence. It is only when he has done an act that the law has declared to be criminal that he can be punished or deprived of any right common to his fellow-citizens, and then he is not punished, or thus deprived, because of his opinion but because of the commission of the act which has been forbidden by law.

It is not a crime, and in this country cannot be made a crime, to belong to any particular church, and this, as we shall hereafter see, even though it teach bigamy and polygamy. No legislative authority has ever attempted to make such a law. The full extent to which a statute might go would be to punish the act of bigamy or polygamy when committed.

The appellant, in "the free exercise of religion," was entitled to his membership in the Mormon Church. He had committed no act forbidden by law. *Therefore the provisions of the Idaho statute disfranchising and debarring him from office are unconstitutional and void.*

II.

THIS IDAHO STATUTE VIOLATES THE XIVTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Constitution, Article XIV, Amendments.

The provisions of the statute of Idaho which provide that no person who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory," and that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestialmarriage as a doctrinal rite of such organization," are in violation of this article of the Constitution and therefore void.

As this Article XIV is, in terms, an inhibition against the States, it may be contended that it does not apply to enactments by a Territorial legislature or by Congress. On this point our contention is that when that provision was placed in the Constitution it became a fundamental principle of Government, and from that time forward there could be no legislation from any source, or by any legislative body within the jurisdiction of the United States, the effect of which would be to abridge the privileges or immunities of any citizen, or to deprive him of life, liberty, or property

without due process of law, or to deprive him of the equal protection of the laws. That provision was enacted to secure to every citizen in the United States the same rights that all other citizens enjoy, and what we are now contending for rests upon the same principle that was announced by this Court in the Sinking Fund cases, (99 U. S., 718,) and has been announced in other cases, to wit: that although the Constitution only prohibited the States from enacting laws impairing the obligation of contracts, yet that principle was fundamental, and the power to make laws impairing the obligation of contracts no more existed in Congress than in the States. And so here, while the language of this constitutional provision is that no State shall make any law to abridge the privileges of any citizen, or deprive him of life, liberty, or property, without due process of law, or deny him the equal protection of the laws, such legislation being fundamentally wrong, Congress cannot pass such a law, neither can the legislature of any Territory, which derives all its power to legislate from Congress.

Passing now from this preliminary consideration, we are brought to the question whether or not these portions of the Idaho statute which are under consideration are an abridgment of the privileges of the citizen, or deny to him the equal protection of the laws. In other words, is it competent for the legislature of Idaho to enact that a man shall not vote or hold office who belongs to the Mormon church, which, it is averred in this indictment, teaches, as a duty resulting from membership, the doctrine of bigamy and polygamy? It is important to keep in mind, in this connection, that there is no statute in Idaho that makes, or attempts to make, it an offence to belong to the Mormon Church, or to any church that teaches such doctrines; and we have, therefore, here presented a case where the party was required to make oath that he did not belong

to such a church, and, upon failure to take such oath, he was prohibited from holding office or voting at an election. If he has not committed bigamy or polygamy, no matter to what church he belongs, or whether he belongs to any church, of course he cannot be punished for that offence. If he belongs to a church, the Mormon Church, he has not thereby committed any offence, because membership in such church has not been made an offence. So that, in no aspect of the case, can he be regarded as having committed any offence for which he can in any way be punished. But the deprivation of the right to vote or hold office is, under these circumstances, a punishment, because it deprives a man of one of the most important rights recognized as appertaining to a citizen in a government by the people, and because it casts an odium, and places a brand upon him by stigmatizing him as being unworthy to participate in the Government to which he must render obedience, and therefore it comes within the declaration of this Court in the Cummings case (4 Wall., 320), where the Court says: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

Without his having committed any offense against the law, this legislation singles him out and refuses him a high privilege because of membership in a particular chuch; such discrimination is a denial of the equal protection of the laws.

Congress recognized this principle in the so-called Edmunds Act, 22 Statutes, 30, and, after disfranchising all bigamists and polygamists, provided in the ninth section of the act that *no person* otherwise eligible to vote *should be excluded from the polls "on account of any opinion such person may entertain on the subject of bigamy or polygamy."*

So we say that the act of Idaho is an illegal discrimina-

tion against a certain class of citizens and in violation of the fourteenth article of amendments, as that article has been construed by this Court.

In Strauder *v.* West Virginia, 100 U. S., 307, in speaking of the fourteenth amendment, this Court says:

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

And at page 308 the Court says:

"If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend that no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. *Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment?*"

In *Ex Parte* Virginia, 100 U. S., 347, the Court says:

"The constitutional amendment was ordained for a purpose. *It was to secure equal rights to all persons*, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation."

In Yick Wo *v.* Hopkins, 118 U. S., 369, the Court says:

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of *purely personal and arbitrary power.*"

In United States *v.* Cruikshank, 1 Woods, 308, Mr. Justice Bradley, speaking of the guarantee of protection under the fourteenth article of amendment, said: "It is a guarantee against the exercise of arbitrary and tyrannical power on the part of the government and legislature of the State."

And in the same case, in this Court, the Chief Justice, in speaking of the guarantee of this amendment, said:

"The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. The duty of protecting its citizens in the enjoyment of the equality of rights was originally assumed by the States and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right."

92 United States, 555.

Such being the obligation resting upon the United States Congress it may pass such acts as may be necessary to prevent the State from denying this equal protection, but the right of the citizen to have equal protection is not limited to such action as Congress may take. If Congress omits to take such action as is necessary to secure this equal protection, whenever a case is presented in which such protection has been denied by an act of the State, whether through its legislature, its judiciary, or any other agency, which deprives a citizen of that equal protection,

this Court will afford him that protection by pronouncing the act by which, or through which he was deprived of this right, void.

These extracts show how far reaching is this 14th article of amendment. It prohibits discrimination on account of color, on account of race. It strikes down all attempts to exercise purely personal and arbitrary power. It secures equal rights to all persons. It will not permit the State or any agency of the State to do anything which discriminates in favor of one citizen, or class of citizens, as against another citizen or class of citizens. And it inevitably follows as a result of this that it equally prohibits any discrimination by the State in favor of one religious sect against another. It is broad enough and comprehensive enough to protect every right of the citizen, civil, political and religious against any assault thereon by the State, and to secure to every citizen immunity from restraints not placed upon all others, and this having become a fundamental principle of the Government, it is a prohibition not merely upon a State, but equally a prohibition upon Congress and upon the Territorial legislatures.

But in addition to this, and as bearing more directly upon another clause of this amendment, we cite the language of this Court:

"The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law."

Minor *v.* Happersett, 21 Wall., 176.

On this subject, Judge Jeremiah S. Black said:

"*The right of suffrage is part of a voter's property.* Its value is inestimable, because it is the right preservative of all other rights. You cannot deprive him of it without due process of law."

Black's Essays and Speeches, 612.

"It cannot be necessary to say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary benefit, as if the law regarded no rights but rights of money and visible, tangible property, of what nature are all rights of suffrage? *No elector has a particular personal interest, but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him.*"

Daniel Webster in Dartmouth College Case, 5 Webster's Works, 479.

"A share in the sovereignty of the State, which is exercised by the citizens at large in *voting at the elections, is one of the most important rights of the subject*, and in a republic ought to stand foremost in the estimation of the law. *It is that right by which we exist as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property.* Such a doctrine would ill suit the principles of the Revolution, which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to a share in the Government. Let me caution against precedents which may, in their consequences, render our title to this great privilege precarious."

Alexander Hamilton, quoted in 4 Wall., 291.

Referring to the kinds of legislation we are now considering, Mr. Hamilton said:

"Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of *disfranchisement, disqualification*, and *punishments by acts of the legislature.* The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or

oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common-sense. * * * The people are sure to be losers in the event, whenever they suffer a departure from the rules of *general and equal justice*, or from the true principles of *universal liberty*."

Quoted in 4 Wall., 292.

We quote these as showing how deep-seated in the principles of this Government is this right of having the elective franchise. At the very beginning of the Government it was regarded as one of the most important of all political privileges that were to be enjoyed by the citizen, and, such being the case, this principle is particularly and emphatically, and of necessity, embraced within the provision of the fourteenth article of amendment to which we now allude.

The Right to Prescribe Qualifications for Voters.

But it may be said that a State or a Territory has the right to prescribe the qualifications of voters and, as a general proposition this is not controverted by us, but that right is not an unlimited one. It must be exercised within the provisions of the Constitution. It must be a reasonable exercise of power and not such legislation as will deprive the citizen of any rights or privileges that are guaranteed to him by the Constitution of the United States.

No precedent can be found that is precisely applicable to this case, since it is the first time, in the history of the Government, that an act of the character now being considered has been enacted by the legislature of a Territory.

As to a State, it may be conceded, as a general proposition, that it has the right to fix such qualifications, but,

while it is not necessary to this case to settle or determine how far a State may go in this direction, as the power of the State in this regard may be claimed to have some bearing on the case, we do not concede, but deny, that a State has unlimited power to prescribe the qualifications of its voters.

Religious liberty, as we have already seen, is now classed among the "absolute rights of individuals" (2 Kent Com., 34), or "among the first of civil rights" (Cooley on Torts, 33), and, since a citizen of the United States, although he may be, and of necessity is, a citizen also of a State, the latter, in the exercise of its right to fix the qualifications of voters, cannot prescribe a religious test without striking down this right which, by the Constitution, is guaranteed to the citizen.

The State could not make as a test for holding office that a man should or should not be a Catholic, or a Methodist, or a Presbyterian, or that he should not believe in baptism by immersion or sprinkling, or be a member of a particular church because of its doctrines, for the reason that the Constitution, which was made for all the people of all the Nation, was intended to secure to them all the free exercise of religion; and, therefore, it cannot be permitted to a State to abridge or impair this Constitutional right of the free exercise of religion, by admonishing the citizen that if he does exercise it he shall not enjoy the privileges of voting or holding office.

To permit this would be to permit the States to reduce our boasted religious liberty to a mere idea—a shadow without substance—for the citizens, while citizens of the United States, are, at the same time, citizens of the States, and if the latter may thus prevent the free exercise of religion, the Constitutional guaranty exists only in name.

And this, we submit, is so, especially since the adoption of the XIVth Article of Amendment to the Constitution.

That amendment expressly forbids the State to deny to any person within its jurisdiction the equal protection of the laws.

This equal protection of the laws is not confined to the protection of such laws as the State may itself make, but it is much broader in its signification, and must be regarded as embracing whatever rights the citizen has under the Constitution of the United States; and, since the Constitution of the United States guarantees to him religious liberty and the free exercise of religion, no State, by any enactment, can, directly or indirectly, strike down or impair his right to his religious belief or his right to freely exercise his religion.

To permit to a State the exercise of arbitrary and unlimited power on this subject would be to authorize it to subvert this principle. If the State can do this, it may say that a man shall not vote because he is an infidel, one who does not believe in the Scriptures, or because he is an atheist, or because he is a Jew and thus it may continue to eliminate until the adherents, of every sect are disfranchised but one. Therefore, these provisions of the Constitution are a limit upon the power of the State to fix the qualifications of voters.

There is another view of this case that, we submit, must operate to prevent the State from going to the extent to which we have alluded. Under the Constitution no religious test for the office of President, Vice-President, Members of Congress, etc., can be fixed or established by Congress. If the religious test is made for franchise it indirectly makes a religious test in respect of the matters just referred to. It directly interferes with the functions of the National Government.

In most of the States the electors for President and Vice-President, and Members of Congress, are voted for on the same ticket and in the same ballot-box, and at the same time

that the voter casts his vote for the State officers he casts his vote for these electors and Members of Congress. His qualification to vote for Members of Congress and electors is the same as for State officers. And if a State may make a religious test for qualification as a voter, that same qualification applies to voting for Members of Congress and electors, and thus might conduce to the selection of these by the adherents of some sects to the exclusion of others. And this, we submit, is contrary to the entire spirit of the Constitution, which is that religion shall not enter into or in any way affect the political affairs of the Nation. And for this reason a State cannot be permitted in the exercise of its power to fix qualifications, to make a religious test of any kind or character whatsoever.

We have said this much in relation to the power of the State to fix qualifications of voters, not because we deem it essential to the determination of this case, but because of broad assertions that are made in text-books and decisions of courts, which would seem to accord to the States unlimited and arbitrary authority in this regard, which were not made when matters such as are here being discussed were under consideration, and we make these observations in this connection to attract the attention of the court to the subject, and to protest against any recognition, by this Court of the right of a State to fix a qualification that impairs, in any way, any right which the citizen has under the Constitution of the United States, or that violates any of those fundamental principles which underlie all free republican governments.

But whatever may be the right of a State in this regard, the same right does not attach to the legislature of a Territory, and for the reason, that the powers of a Territorial legislature are derived from Congress, and it can exercise no power that Congress could not itself exercise.

In Murphy *v.* Ramsey, 114 U. S., 44, this Court says:

"The people of the United States, as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited."

And this brings us back to the question already considered, whether or not Congress, in legislating for the Territories, has the right to prescribe a religious test for the qualification of voters and for holding office; a right which we deny can be exercised by Congress, for reasons hereinbefore and hereafter stated.

III.

THIS IDAHO STATUTE VIOLATES ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES.

No religious test shall ever be required as a qualification to any office or public trust under the United States.
Constitution, Article VI.

The provisions of the Idaho statute which provide that no person "who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, *is permitted to vote at any*

election, or to hold any office or position of honor, trust, or profit within this Territory," and that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization" are in violation of this clause of the Constitution.

This Constitutional provision was designed to exclude all consideration of religion, or religious opinion, in fixing the political rights of the citizen. Whatever else may be done or considered in fixing his political status, or in according or withholding political rights, his religious opinion cannot be considered.

That this is so cannot be more clearly expressed than in this provision, by which a religious test to hold office is, with such emphasis, forbidden.

This being forbidden everything incident to it is forbidden. It would be a strange anomaly, when the Constitution so prohibits a religious test as a qualification to an office, and thereby makes a man of any religious faith, or of no religious faith, eligible to hold the office of President, if it could be enacted by any legislative body that he must be of some particular faith, or must not be of some specified faith, or he should not vote at an election for the office which the Constitution says he is eligible to hold. Such an inconsistency would be hostile to the spirit of our Government and the Constitutional provision; the one is the concomitant of the other, and no religious test can be applied to the one that does not directly or indirectly affect the other, and what cannot be done directly cannot be done

indirectly (4 Wall., 125). There must be harmony and consistency in such a matter as this, and the application of the principle must extend to the Territories of the United States.

Holding office and selecting persons to hold office are inseparable parts of our system. They are associated together, and when a religious test is forbidden to be applied to the one, it is equally forbidden to be applied to the other.

That this statute requires a religious test is apparent upon its face. The ground of disfranchisement is membership in an organization which encourages its members to commit bigamy or polygamy "*as a duty resulting from membership*," or which *practices* bigamy or polygamy, or celestial marriage, "*as a doctrinal rite of such order*." Simple encouragement to commit crime by an organization of which the citizen is a member does not disqualify him from voting, because, by the language of the act, the encouragement must be offered upon the ground of duty, or religious obligation arising from membership in the organization, or the latter must teach the commission of these acts from religious motives, otherwise the exclusion does not operate. And so also the practice must be "as a doctrinal rite," or the member is not excluded. In other words the practice must be as a tenet of faith, sanctified by a religious ceremony; and the language of the statute does not admit of such an interpretation as will disfranchise the members of an organization existing solely for the promotion of crime, however henious their acts may be, even though the primary and sole object of the organization be to commit murder, theft, arson, rape, and other crimes which are *malum in se;* unless their acts are the promptings of duty, or are performed "as doctrinal rites" or religious ceremonies, the members are not disqualified by this statute from voting or holding office.

Mr. Webster defines a "rite" as:

"The act of performing divine or solemn service, as established by law, precept, or custom; formal act of religion, or other solemn duty; a religious ceremony of usage."

The object of this legislation was not only to deprive citizens of the elective franchise because of their membership in a religious organization, the Mormon Church, but to confine the exclusion provided for to members of that religious organization.

IV.

THE IDAHO STATUTE IS VOID BECAUSE CONGRESS HAS EXERCISED ITS POWER ON THE SAME SUBJECT.

While denying the power of both Congress and the legislative assembly of Idaho to prescribe the test it has, as a qualification for voting and holding office, if in error as to the power of Congress in this regard, we still maintain that the Territorial legislature could not prescribe it, for the reason that Congress had already legislated upon the sub ject, and its action is "the supreme law of the land."

Undoubtedly Congress has the right to legislate for the Territories, and the most that can be said for the Territorial legislature is that it may legislate upon the same subjects if Congress has not already legislated thereon, and in that respect it stands in the same attitude towards Congress as a State, which may legislate if Congress does not, but if Congress does legislate a State cannot, or if the State has legislated and Congress afterwards does so, the State legislation is superseded.

The authorities on this subject are numerous and familiar.

It is now settled that when powers are exercised by Congress, the concurrent power in the inferior legislature ceases or is in abeyance; that the two legislative wills cannot be

exercised at the same time upon the same subject-matter, and that of Congress, within its sphere is "the supreme law of the land."

Paschal's Annotated Const. (3d ed.), Sec. 288.
Ex-parte McNiel, 13 Wall., 240.
Gilman *v.* Philadelphia, 3 Wall., 713, 727.
Pennsylvania *v.* Wheeling Bridge, 18 How., 430.

In Railroad Company *v.* Fuller, 17 Wall., 568, this Court says that one class of the powers of Government in the complex system of polity which exists in this country, comprises—

"Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject; the authority of the State then retires and lies in abeyance until the occasion for its exercise shall occur."

And speaking of some of the cases above cited, at page 569, the Court says:

"In Gilman *v.* Philadelphia, the State of Pennsylvania had authorized the erection of a bridge over the Schuylkill river in the city of Philadelphia. This Court refused to interpose, because there was no legislation by Congress 'affecting the river.' The authority of Congress over the subject was affirmed in the strongest terms. 'In the Wheeling Bridge case, the bridge was decreed to be a nuisance, because Congress had regulated the Ohio river, and thereby secured to the public the free and unobstructed use of the same.' Congress subsequently legalized the bridge, and this Court held the case to be thereby terminated.

"In Cooley *v.* The Board of Wardens, the validity of a State law establishing certain pilotage regulations was drawn in question. It was admitted by this Court that the regulations were regulations of commerce, but it was held that they were valid and would continue to be so until superseded by the action of Congress. In ex-parte McNeil the

same question arose, and the doctrine of the preceding case was reaffirmed."

Chancellor Kent, in speaking of the decision of the Supreme Court in the case of Houston *v.* Moore, says:

"The doctrine of the Court was, that when Congress exercised their power upon any given subject, the State could not enter upon the same ground and provide for the same objects. The will of Congress may be discovered as well by what they have not declared as by what they have expressed. The two distinct wills cannot at the same time be exercised, in relation to the subject, effectually, and at the same time be compatible with each other. If they correspond in every respect then the latter is idle and inoperative. If they differ, they must, in the nature of things, oppose each other so far as they do differ. It was therefore not a true and constitutional doctrine, that in cases where the State government has concurrent power of legislation with the National Government, they may legislate upon any subject on which Congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other."

1 Kent's Commentaries, 389.

At page 391, the Chancellor says:

"The question was, whether a State legislature had any concurrent power remaining after Congress had provided, in its discretion, for the case. The conclusion was, that where once the legislature of the Union has exercised its power on a given subject, the State powers over that same subject, which had before been concurrent, was by that exercise prohibited; and this was the opinion of the Court."

In the case referred to by Chancellor Kent, this Court says:

"The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution,

without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared that the punishment for the disobedience of the act of Congress shall be a certain fine, if that provided by the State legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said therefore not to be repugnant to it. *But surely the will of Congress is, nevertheless, thwarted and opposed.*"

Houston *v.* Moore, 5 Wheaton, 22, 24.

The Court continues in the same connection:

"This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the Constitution of the United States, the benefit of which he may lawfully claim."

Ibid, 23.

Again, at page 24, the Court says:

"This course of reasoning is intended as an answer to what I consider *a novel and unconstitutional doctrine*, that in cases where the *State government have* a *concurrent power of legislation* with the National Government, they may legislate upon any subject *on which Congress has acted, provided the two laws are not in terms*, or *in operation, contradictory* and *repugnant to each other.*"

This doctrine applies to the present case in this way. Section 1860 of the United States Revised Statutes provides as follows:

"At all subsequent elections, however, in any Territory hereafter organized by Congress, as well as at all elections

in Territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each Territory; subject, nevertheless, to the following restrictions on the power of the legislative assembly, namely:

"First. The right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the Constitution and Government of the United States.

"Second. There shall be no denial of the elective franchise or of holding office to a citizen on account of race, color, or previous condition of servitude.

"Third. No officer, soldier, seaman, mariner, or other person in the Army or Navy, or attached to troops in the service of the United States, shall be allowed to vote in any Territory by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile.

"Fourth. No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory."

By this provision it will be seen that Congress authorized the legislature of the Territory to prescribe the qualifications of voters, with the exceptions named in this section. We have already attempted to show that even under that section the legislature could not prescribe a religious test. But by the act of 1882, Congress took up the subject of bigamy and polygamy, and by the eighth section of that act, dealt with the consequences of the commission of those offences; and, in that connection provided, not for Utah alone, but for all the Territories, as follows:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman co-

habiting with any of the persons described as aforesaid in this section, *in any Territory* or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States." 22 Statutes, 31.

This, then, is a case where "Congress has acted" and has "exercised its power on a given subject," thereby, as we insist, placing it beyond the power of the Territorial legislature to enact any law whatever on that subject. What the legislature has sought to do is to add to the legislation of Congress, and that is precisely what this Court, in the language above quoted from Houston *v.* Moore, *supra*, has characterized as "a novel and unconstitutional doctrine; that in cases where a State government have a concurrent jurisdiction with the National Government they may legislate on any subject on which Congress has acted, provided the two laws are not in terms or in operation contradictory and repugnant to each other."

It is not necessary, according to the language of the Court, that the two laws shall be repugnant to each other in order to deprive the Territorial legislature of the power to legislate. It is only necessary that Congress should have legislated upon the same subject. And the legislature of the Territory cannot supplement that legislation by adding something which Congress did not see fit to enact.

Congress provided that no bigamist or polygamist shall be entitled to vote. This was legislation upon the subject of disfranchisement, as connected with the offences of bigamy and polygamy. This is as far as Congress ventured to go; but the Idaho legislature undertakes to add to what Congress has seen fit to do, another disqualification, namely,

membership in the Mormon Church. Such additional legislation is unconstitutional and void.

The Mormon Church not a Criminal Organization.

We have already anticipated that the attempted answer to what we have been discussing will be that the exclusion which we resist is not because of religious opinion or belief, but only because of membership in a church which inculcates as a doctrine bigamy and polygamy, and if there is any answer to our contention it must be found in what we have just stated. We have already partially considered this point, and now offer the following additional suggestions in support of our contention that it is no answer to our propositions. If it is an answer to every other objection that we have made, it is no answer to the one which rests upon the proposition that Congress, having legislated upon the subject of disfranchisement, the Territorial legislature could not legislate further on that subject; but we submit that it is not an answer to any of the other propositions we have presented, because it rests entirely upon the mere fact of membership in such a church. It involves of necessity an enquiry into the doctrines of this Church and the religious belief of its members. It of necessity involves a condemnation of opinion and undertakes to control individual association because of opinion or belief. It virtually says that men who entertain the opinion that polygamy is sanctioned by divine law shall not associate themselves together as a church and exercise religion, so that this attempted answer is bottomed in, and rests upon exclusion from the elective franchise because of opinion.

The reply to this position, that it is exclusion because of membership, and not because of opinion, must be looked for in a careful consideration and application of those general

principles of constitutional law which lie at the foundation of all elective governments.

That a citizen, who is entitled to vote according to the general principles and the fundamental scheme of his Government, cannot be deprived of that right by the mere caprice or arbitrary act of the legislature—such act not being founded upon some recognized principle of reason looking to the welfare of the State—is one of those general and well-settled maxims of constitutional law, which are of universal recognition. This will be found either expressly asserted or recognized in such cases as—

The People *v.* Maynard, 15 Mich., 471.

Lanning *v.* Carpenter, 20 New York, 449.

Attorney-General *v.* Supervisors of St. Clair, 11 Mich., 63.

According to this constitutional principle, a statute which attempted to disfranchise a citizen because he was a cripple, or because physically deformed, or because he had red hair, would be void in every free country.

Or, coming somewhat nearer to the case at bar, a statute which disfranchised a member of the "Society of Friends" merely because he was a member of that society, and because such society holds and teaches that all resorts to war are wrong, would be held, by the universal judgment of free countries, to be void. It would be so held, not merely because of its invasion of that religious liberty which is secured by the constitutions and bills of rights of all free and elective Governments, but also, because such a law is so grossly unequal, so arbitrary and unjust as to put it outside of the province of legislation.

3 Dall., 388; 2 Dall., 308, 309.

13 Wall, 662; 15 Wall, 622; 20 Wall, 668.

Apply, now, these general principles of law to the case at bar, and in so doing, keep carefully in mind those other accepted principles of constitutional law to which we have already pointed, to wit:

One, that disfranchisement cannot be based on mere *beliefs*, religious or otherwise, as distinguished from *acts*.

Another, that such disfranchisement cannot be based on the observance of the practices of one's religion, when these do not involve crime against the State.

Still another, that in the case at bar, the act which the statute of Idaho makes a cause of disfranchisement is *not* that the appellant's church was not a "religious" society within the sense of the word "religion" as found in the first article of the amendment to the Constitution; nor that the appellant either believed in or practiced, or inculcated the practice of, any offence against the State, unless, indeed, his said membership constituted, *per se*, such inculcation.

These indisputable points being carefully remembered, it results, that *if this statute is to be sustained as a valid one, then it must be because it is competent for the legislature to disfranchise a citizen for the mere fact that some of his church associates believe in a certain practice made criminal by law.*

If such a companionship, or such a membership, can be made the sole ground for disfranchisement, then, manifestly, the legislature can just as well make any other mere companionship, or association, with persons who believe or who teach doctrines, some of which are forbidden by law, to be the sole ground of disfranchisement.

This becomes self-evident, because this indictment does not allege that the appellant was guilty of any crime—that he believed in any criminal practice—that he taught any criminal practice, or that a person could not belong to said

church without believing in or practicing or inculcating such forbidden practices. On the contrary, the indictment only shows that he was a member of a church where such practice was held as a duty.

Hence, as already remarked, if this law can be sustained, it must be because that it is competent for the legislature to ordain that any citizen, although in all respects innocent and pure and intelligent, and qualified to exercise the elective franchise equally with the most eminent in the State, may be disfranchised merely because he belongs to a society or a club, or a traveling party, or a church, wherein are admitted those who hold or teach certain practices regarded by the law as criminal.

If the legislature may ordain that no man shall vote who has for his companions in the church those holding such principles, then, surely, it is equally competent for the legislature to prohibit a man from voting who has for his associates, in any *other* form of organization, or any *other* companionship, people holding the same principles.

It seems to us, and we therefore submit, that if such act of companionship can be seized upon by the legislature and made the ground for disfranchising the citizen, then there is nothing that cannot be made the ground of such disfranchisement, and the citizen is left, in this regard, subject to the mere caprice of the legislative will, and liable to its exercise of arbitrary and despotic power.

Could it be that one man, if he taught polygamy as a Christian duty, could be disfranchised because of such teaching? Hardly. If one man could not, neither could a dozen, or a hundred, or any other number. Could an association composed of such men, associated for the purpose of promulgating such a doctrine, be declared an unlawful or criminal association? That could not be. If it could, then an association of liquor sellers could be made a criminal organ

ization for teaching that laws forbidding the sale of liquors are wrong, and should be repealed.

If such things as those can be declared criminal, then any association of citizens for the purpose of opposing legislation which declares anything an offence not *malum in se* could be dissolved as being hostile to good government, and its members punished by disfranchisement.

The logical consequences of such a doctrine must condemn it. But suppose another case: that there is an ecclesiastical association, a church, that has for its creed the following:

ARTICLES OF FAITH OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS.

1. We believe in God, the Eternal Father, and His Son, Jesus Christ, and in the Holy Ghost.
2. We believe that men will be punished for their own sins and not for Adam's transgression.
3. We believe that through the atonement of Christ all mankind may be saved, by obedience to the laws and ordinances of the gospel.
4. We believe that these ordinances are: First, faith in the Lord Jesus Christ; second, repentance; third, baptism by immersion for the remission of sins; fourth, laying on of hands for the gift of the Holy Ghost.
5. We believe that a man must be called of God, by "prophecy, and by the laying on of hands," by those who are in authority to preach the Gospel and administer in the ordinances thereof.
6. We believe in the same organization that existed in the primitive church, viz., apostles, prophets, pastors, teachers, evangelists, etc.
7. We believe in the gift of tongues, prophecy, revelation, visions, healing, interpretation of tongues, etc.
8. We believe the Bible to be the word of God, as far as it is translated correctly; we also believe the Book of Mormon to be the word of God.
9. We believe all that God has revealed, all that He does

now reveal, and we believe that He will yet reveal many great and important things pertaining to the Kingdom of God.

10. We believe in the literal gathering of Israel and in the restoration of the Ten Tribes. That Zion will be built upon this continent. That Christ will reign personally upon the earth, and that the earth will be renewed and receive its paradisic glory.

11. We claim the privilege of worshiping Almighty God according to the dictates of our conscience, and allow all men the same privilege, let them worship how, where, or what they may.

12. We believe in being subject to kings, presidents, rulers, and magistrates; in obeying, honoring, and sustaining the law.

13. We believe in being honest, true, chaste, benevolent, virtuous, and in doing good to *all men;* indeed we may say that we follow the admonition of Paul: "We believe all things, we hope all things," we have endured many things, and hope to be able to endure all things.

If there is anything virtuous, lovely, or of good report or praiseworthy, we seek after these things.

This is the religious creed of the Church of Jesus Christ of Latter-day Saints, or Mormon Church, and is introduced here for the purpose of showing that this Church is not an organization or association for the purpose of or devoted to teaching polygamy, but is a teacher of principles and doctrines that must commend themselves to all Christian people, and therefore it clearly comes within the provisions of the first article of amendment to the constitution, and is entitled to its protection.

And in this connection we desire to say that, while we are precluded by the language of this indictment from questioning the truth of its averment, that the Church teaches polygamy as a duty arising and resulting from membership, we trust that we may be pardoned for denying, as a matter of fact, that any such duty is enjoined; and, while there are

differences of opinion among members of this Church, as there are among members of every other church, we assert that this Church does not teach that polygamy is a duty arising and resulting from membership, but that it only teaches that polygamy, under special circumstances is permissive, or, in other words, that a man may practice polygamy without violating the laws of God; and it further teaches the obligation of its members to obey the laws of the land.

But returning to our supposed case, let us assume that, in addition to the creed, there is taught the doctrine that polygamy is a duty, as averred in the indictment, could such a church be declared to be a criminal organization, and could a member of that church be disfranchised because of his membership in it? If a man can be legally disfranchised for membership in that church the door is wide open for the destruction of religious freedom.

Such legislation presupposes that every man who unites himself with a church sanctions and approves every dogma of the church, and condemns him whether in fact he believes or practices it or not.

It is not going too far to say that it is a matter of common knowledge that members of a church do not always subscribe to all the dogmas or tenets of the church to which they belong.

This is equally true as to the Mormon Church. Whatever its teachings may be, but a small portion of its members are, or ever have been in polygamous relations, and, in the absence of proof on the subject, it is not to be presumed that all the members endorse these doctrines and practices, any more than that eminent Presbyterian divines believe in the doctrines or declarations that they are endeavoring to eliminate from their creed.

To say, therefore, that a man shall be disfranchised, because of the fact that he belongs to the church, is only

evading the real reason, and attempting by an artifice to escape from and to set at naught principles that are of the very essence of our system of government. It goes much deeper than mere membership, and reaches to and attempts coercion in the matter of opinion. Against such an assault we most earnestly protest. It is an insidious method of invading the sacred domain of conscience and striking down the safeguards of religious liberty.

The Honorable Jeremiah S. Black, in relation to religious tests for holding office, used this expressive language:

"There shall be no religious test as a qualification for holding office. Make what other test you please. Exclude a man, if you like, for his political sentiments, or his moral conduct, for his wealth or his poverty, for his youth or his age; make war on him for the color of his hair, the length of his legs, or the shape of his nose, but let him alone about his religion; that is consecrated ground; that is a point on which the Constitution has refused to trust you with one particle of power; and wisely, too, for mortal men are not fit to be trusted with such power; they have never had it without abusing it."

Black's Essay and Speeches, 54.

And these words may be aptly applied to making religious opinions or membership a cause or test of qualification as a voter.

With these suggestions, we leave the case and this most important question in the keeping of the Court.

FRANKLIN S. RICHARDS,
JEREMIAH M. WILSON,
SAMUEL SHELLABARGER,
For Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1261.

SAMUEL D. DAVIS, APPELLANT,

vs.

H. G. BEASON, SHERIFF OF ONEIDA COUNTY, IDAHO, APPELLEE.

BRIEF FOR APPELLEE.

H. W. SMITH,
For Appellee.

F. S. RICHARDS,
J. M. WILSON,
SAMUEL SHELLABARGER,
For Appellant.

JUDD & DETWEILER, PRINTERS.

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BRIEF FOR APPELLEE.

The question raised in this action is one of great moment. It involves the inquiry as to whether or not the law of Idaho Territory, so far as set out in the second subdivision of the petition, is valid. If it is, then the judgment of the district court must be affirmed. If it is not, then that judgment must be reversed and the petitioner discharged. This is the matter of chief importance in this case.

One other question was raised in the court below which is not raised here, and we shall pass it without stating it.

The statute complained of is found in section 501 of the Revised Statutes of Idaho Territory. That section prescribes

the disqualifications of electors in the Territory, and is in the following language:

"No person under guardianship, *non compos mentis* or insane, nor any person convicted of treason, felony, or bribery in this Territory or in any other State or Territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory."

The second subdivision of section 504 of the Revised Statutes of Idaho requires, as a condition precedent to the right to register, that every person offering to register shall take what is called the elector's oath. This oath requires in effect the person offering to register to swear that he is not under any of the disqualifications named in section 501.

Section 571 of the same statutes provides a similar oath to that in section 504, to be taken at the polls by the voter upon his being challenged.

These several statutes being in substance the same, it becomes us to inquire if the Legislature of Idaho had the power to enact the statute set out above, and specially that portion of the statute cited and set out in the petition.

The contention of counsel for appellant here is that these statutes violate, first, the first amendment to the Constitution of the United States; second, the fourteenth amend-

ment to the Constitution of the United States; and, third, as I understand them, that it violates the eighth section of the act of Congress of March 22, 1882, commonly known as the Edmunds law; and, fourth, it violates the sixth article of the Constitution of the United States.

We will examine these objections in the order in which we have stated them.

Does the act complained of violate the first amendment to the Federal Constitution? I concede that the Territory of Idaho in its legislative powers is controlled directly by the provisions of the Federal Constitution, and that the Legislature of that Territory has no other power over the subject of the elective franchise than such as is consistent with the Constitution and with the Federal laws granting the legislative power to the territorial Legislature.

Section 1852 of the Revised Statutes of the United States gives to the territorial Legislature power to legislate on all rightful subjects of legislation not inconsistent with the Federal Constitution and laws. This would seem to have been sufficient for all purposes; but, after providing for the conduct of the first election in section 1859 of the Revised Statutes, together with the qualifications of electors thereat, Congress, in section 1860 of the Revised Statutes, declares "At all subsequent elections, however, in any Territory hereafter organized, as well as at all elections in Territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assemblies of each Territory."

This general grant of power to the Legislature is followed by four limitations, as follows:

First. That the Legislature shall not confer the right to vote upon minors or aliens who have not declared their intention to become citizens.

Second. The suffrage shall not be denied on account of race, color, or previous condition of servitude.

Third. They shall not confer the right of suffrage upon soldiers or sailors of the United States unless they have made their permanent home in the Territory six months; and,

Fourth. They shall not allow any person belonging to the army or navy to hold a civil office.

These four limitations are the only ones found in the original law as embraced in section 1860 of the Revised Statutes.

It will be seen from these various sections of the Revised Statutes that the legislative assemblies of the several States have the same power over the subject of qualifications of voters at territorial elections as Congress itself has, except they may not, perhaps, absolutely change the form of government and abolish elections as Congress might.

With this view of the power of the Legislature, let us look at the statute under consideration. Is it a law respecting an establishment of religion? We think we may safely say that it does not attempt to establish any religion or church, and this answers this particular objection. But the one really urged is that the effect of the law is to prohibit the free exercise of religion, and, to speak more plainly, the contention is that it prevents the free exercise of the Mormon religion.

The act of Congress of March 22, 1882, commonly called the Edmunds law, in the 8th section provides—

"That no polygamist, bigamist, or any other person co-habiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory," &c.

The statute under consideration here follows the policy of Congress indicated in the section just cited. It says that neither criminals nor their accessories shall vote.

It is confessed in the case at bar that the petitioner is, and was at all the times charged in the indictment, a member of a criminal organization; that while such member he entered into a conspiracy as charged in the indictment. The intention of this conspiracy was to nullify the law by committing perjury by wholesale, and the conspiracy was carried out.

So far as this case is concerned, it is admitted that the Mormon Church is a criminal order such as is described in the statute; that the petitioner is a member of that order; that he conspired with others to violate and nullify this law; that this conspiracy was carried into effect. If this section 501 of the Revised Statutes of Idaho is a valid law, there is no question but the petitioner was properly convicted.

The contention of counsel that this law prohibits the free exercise of religion proceeds upon two propositions, both of which, it seems to me, are fallacious: First, that to deprive a person of the right to vote is a punishment, and, second, that a criminal organization, if called a church and crime

practiced in the name of religion, is beyond the reach of civil power. I do not agree to either of these propositions.

The right to vote is purely conventional, and is granted or withheld at the will of the legislative power. It is not a right inherent in the citizen, nor is it what may be called a natural right. In a state of nature it is not and in the nature of things cannot be enjoyed. It is a social privilege enjoyed only by those to whom it is granted under the social compact.

In Anderson *vs.* Baker, Brightley's Leading Cases on Elections, page 27, the supreme court of Maryland, speaking on this subject, say:

"The right to vote is altogether a conventional one; it may be granted, abridged, or taken away by the State government in its discretion, except so far as it is secured by the State constitution."

In Blair *vs.* Ridgely, Brightley's Leading Cases on Elections, page 90, the supreme court of Missouri say of this right, after pointing out what are the natural, absolute, and vested rights of the individuals:

"But is the right to vote or to exercise the privilege of the elective franchise a right either natural, absolute, or vested? It is certain that in a state of nature disconnected with government no person has or can enjoy it, whilst his right of breathing, free locomotion, and the acquisition and enjoyment of property are perfect."

And again, at page 91, the same authority, the court say:

"As before remarked, outside of society and disconnected with government, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as may be prescribed."

In Minor *vs.* Happersett, 21 Wallace, page 177, after a thorough discussion of this question, this court says that the right to vote is not one of the rights, privileges, or immunities pertaining to citizenship, and concludes:

"Certainly if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution when it conferred citizenship did not necessarily confer the right of suffrage."

Paine on Elections, at section 2, fully defines the elective franchise, and, as I believe, correctly. Without quoting the language in full, I respectfully refer the Court to this section of that authority.

The same author, at section 22, says:

"The disqualification of voters have extended to idiots, lunatics, criminals, deaf mutes, deserters, Indians, paupers, polygamists, duellists, rebels, persons guilty of bribery or of refusing to take a test oath, and to persons not householders. Those statutory provisions which fix the qualification or disqualification of voters are in general mandatory."

And again, at section 94, this author says:

"A State may prescribe a test oath for all electors without violating the Constitution of the United States."

And in the same connection:

"If the Legislature be vested by the Constitution with power to prescribe the qualifications of voters, it may prescribe a substantive qualification in the form of a test oath."

The same must be true of a Territory when this power to prescribe qualifications is conferred by the organic act.

Ii would seem upon principle to be absolutely necessary that the law-making power should have the right to prescribe, by general and uniform laws, the classes who should

and also the classes who should not exercise the elective franchise. It grows out of the right of society to protect itself.

We believe there is not a State or Territory in the Union which does not indicate by positive legislative enactment that certain specified classes of citizens shall not vote, and the right to exclude the ignorant and the vicious from exercising the important franchise of voting has never, to my knowledge, been questioned by any court.

The supreme court of Missouri, Blair *vs.* Ridgely, Brightley's Leading Cases on Elections, page 96, speaking of the constitutional provision there under consideration, says:

"The principle of the provision in the constitution is involved in the power and flows from the duty of the State to protect itself—that is, the welfare of the people; it proceeds upon the distinction between the laws passed to punish offenses in order to prevent their repetition and laws passed to protect the public franchises and privileges from abuse by falling into unworthy and improper hands."

But it seems to me that the question as to whether or not the denial of the right to vote is a punishment is settled by the decision of this Court in the case of Murphy *vs.* Ramsey, 114 United States, at page 43. It is held in that case explicitly that the denial of the elective franchise is not in the nature of punishment; and this Court says:

"It would be quite competent for the sovereign power to declare that no one but a married person should be entitled to vote."

And I may here remark that just such a law would disfranchise all of the numerous clergy of the Roman Catholic Church and the entire membership of the Shakers, and yet, perhaps, no one would ever think of questioning such

a law on the ground that it was a law respecting an establishment of religion or prohibiting the free exercise thereof.

I may give one further example:

Congress in recent years has enacted several statutes placing serious civil and political disabilities upon persons of the Chinese race, all of whom are said to be disciples of the religion of Confucius. Yet we have never heard of these laws being attacked as laws respecting an establishment of religion or prohibiting the free exercise thereof.

As to the granting or withholding of the elective franchise, we understand the question is one of discretion in the law-making power, and while the enactment may be arbitrary, still, if uniform and general—I know of no exception to the rule—it will be upheld.

The policy of a given enactment is not open to inquiry in a court. It is only the power to enact that may be questioned.

Upon the second proposition that this law involves a punishment for religious membership and religious practices, as I understand the law, the practice of crime usually involves two things—punishment for the crime done, in the true sense of that term, and is frequently accompanied with certain civil and political disabilities as attending upon the practice of crime. The latter are not considered punishments, but are a mere withdrawal of political power from the hands of unworthy persons. The disability does not always follow the punishment, and it may be inflicted without judicial inquiry.

It was long contended by this same organization which is here complaining of this law that they might practice openly and notoriously crimes which in other persons would

be felony, because it was a part of their religion. This was earnestly and strenuously asserted by the organization through a long number of years. The matter finally came before this Court in the case of Reynolds, 98 U. S. Rep., at page 166, and this Court, in answer to this objection, say:

"In our opinion, the statute under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories and in places over which the United States have exclusive control. This being so, the only question which remains is whether those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would introduce a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion they may with practices. Suppose that one believed that human sacrifices were a necessary part of their religious worship, would it be seriously contended that the civil government under which we live coul not interfere to prevent a sacrifice; or that a wife religiously believed that it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"

The supreme court of Idaho, in the case of Woolley *vs.* Watkins, 22 Pacific Reporter, page 106, in passing upon the law under consideration here, after making the citation above given from the Reynolds case, say:

"This reasoning and these illustrations apply with as much appropriateness and force to the case in hand as they do to the one cited, and we do not think it necessary to extend the length of this opinion by further discussion to establish the soundness of the distinction pointed out. Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be

members of such organizations or associations are such overt acts of recognition and participation as make them *particeps criminis*, and as guility in contemplation of criminal law as though they actually engaged in furthering their unlawful objects and purposes."

Justice Berry, in the same case, in answer to some of the numerous objections then made to this law, in a special opinion concurring, aptly says:

"Nor is such law directed to the establishment of any religion, nor does it prevent or tend to prevent the free exercise of any religion, nor does it abridge or tend to abridge the freedom of speech or of the press. Under it a member of the organization in question may do and enjoy all he would do without it, except that he may not have the privilege of voting at an election. We know of no law making such an act a religious rite or ceremony."

The supreme court of Idaho in the case of Innis *vs.* Bolton, 17 Pacific Reporter, at page 264, in an able opinion fully sustain the law here under consideration and declare it consistent with the Federal Constitution and laws.

It will be observed by an examination of the statute under consideration that it is not aimed at any particular class or organization, but is general, and prescribes a political disability as a result of criminal association. Such association is, of course, voluntary, and to this effect I need not cite authority.

Every person has it in his own hand under the statute to say whether he will be disfranchised or not. If he elect to remain a member of a criminal organization or to become such, that is his privilege; but he loses the privilege of voting by so doing.

I cannot understand, in the light of the authorities cited

and the law as declared by this Court, that there is anything sacred about crime when practiced in the name of religion, or because it is so practiced. If the party here complaining were confessedly a member of a band of horse-thieves, although he claimed the right to steal horses as a religious privilege, it is hardly probable that this law would be assailed as a law prohibiting the free exercise of his religion.

I may confess that this law, as well as all penal and criminal statutes, is a law enacted to discourage the practice of crime, and if the practice of crime is a religious exercise, then, perhaps, so far they are laws preventing the exercise of that religion. Further than this I see no reason to go.

Mr. Cooley, in his Work on Torts, at page 33, lays down the true rule on this subject in the following language:

"Among the first of civil rights is that of enjoying religious freedom. If this is complete, as it is supposed to be in this country, it implies two things: 1. The right to freely render adoration and worship to the Supreme Being in the manner indicated by the belief and according to the dictates of the individual conscience. 2. The right to be exempt from exactions in support of the worship of others. The first of these may exist where there is only religious toleration. The second enlarges toleration into religious liberty and equality.

"But the liberty to worship, like all other liberty, must have bounds prescribed to it as a necessary protection to rights that might be invaded by extravagance or excess in its indulgence. These bounds must be fixed by law, and as in all other cases of restraining laws, the law on this subject must have regard to the circumstances of the people for whom it is made.

"One of the most important of these circumstances is the religious belief which generally prevails among the people. The same laws which give reasonable protection to religious liberty where one belief prevails might be abhorrent, and

therefore wholly inadmissible, where a different belief is general. To illustrate this we have only to see what is tolerated or required by the religious creeds of some people. The religion of some savage tribes permits human sacrifices and there were saturnalia among the Greeks and Romans; but in Turkey to-day, where religious liberty is supposed to exist, such sacrifices and orgies would be abhorrent and the law would punish them.

"The religion of the Turk, on the other hand, sanctions polygamy, and this in a Christian country would be forbidden and punished as a high offense; but neither in the one case nor in the other is religious liberty violated where that which is abhorrent to the general public is forbidden. There must necessarily be bounds to religious liberty in every country, varying in each with the religious belief and accepted moral code of the people generally. A single sentence may perhaps be sufficient for the presentation of the general principle. Religious liberty in any country cannot embrace those things which the moral sense or a sense of decency of the general public condemns, and which consequently cannot be allowed without injury to the public morals.

"The acceptance of this, as a general rule, cannot preclude any government in its discretion tolerating that which its people would condemn, where for any reason of policy it should think proper to establish regulations to that effect; but the general principle that any class of people in a country can rightfully do that which is offensive to the public morals cannot be accepted.

"Opinion must be free. Religious errors the Government should not concern itself with; but when any people feel impelled to indulge in practices which the general public look upon as immoral excess or license, and therefore destructive of public morals, they have no claim to protection in so doing. The State cannot be so bound to sanction immorality or crime, even though there be persons in a community with minds so perverted or depraved or ill-informed as to believe it to be countenanced or commanded of Heaven. And the standard of immorality and crime must be the general sense of the people embodied in the law. There can be no other.

"When religious liberty is defined there may still be rules for regulating its enjoyment. We say in general that every

man is at liberty to worship God according to the dictates of his own conscience. But one man's conscience may perhaps impel him to gather a crowd for worship in the streets of a populous city, or to invade the house of worship of the people of another belief and interrupt their exercises by substituting his own, or, Cassandra-like, to give solemn warnings in legislative halls or courts of justice.

"These the law must deal with as the excess of liberty, because they encroach upon the just liberty of others or disturb the public order. Concede to every man the right to follow what he may assert to be the dictates of his own conscience, and there must soon be no organized society and no rational liberty of any sort. The reason is obvious: Society and liberty, as has often been shown, depend for their existence upon regulations and restraints."

In Spear on Religion and the State, page 317, the same rule is laid down and approved as that just cited from Cooley.

While I would not claim that mere legislative enactments are to be considered as judicial precedents, yet when we reflect upon the circumstances under which the act of Congress of March 3, 1887, commonly called the Edmunds-Tucker law, was enacted, as well as the high legal ability of the authors of that law, it merits serious consideration, and I believe that the 24th section of that act goes just as far (although only applicable to Utah) as the law under consideration. After requiring the intending voter to swear to support certain laws of Congress specially, it then provides "that he shall swear that he will not directly or indirectly aid or abet, counsel or advise any other person to commit any of the said crimes" (meaning polygamy), &c.

It seems to me that this act excludes from the elective franchise all those who voluntarily associate themselves together to teach and encourage these crimes, and that is all on earth that the law under consideration does. While

there is a difference in the language I see none whatever in the meaning, and I call attention to this as an expression by Congress of what it deems constitutional, and I do it the more willingly on account of the well-known ability of those who are the authors and promoters of this legislation.

The second proposition is that this law violates the fourteenth amendment to the Constitution; that it denies to some of the citizens the rights, privileges, and immunities of citizenship. In the answer to this objection I think I need only cite the opinion of this Court in the case of Minor *vs.* Happersett, 21 Wallace, page 177, above cited. The discussion of the question there is so thorough and complete and so fully answers the objections made here that it seems to me to need no further argument upon my part.

I would call especial attention upon this point to the opinion of this Court in Murphy *vs.* Ramsey, 114 United States, at page 45. In speaking there of the Edmunds law disfranchising polygamists the Court says:

"If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided that the act of Congress here in question is within that justification, for certainly no legislation can be supposed more wholesome and necessary for the founding of a free, self-governing Commonwealth, fit to rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony—the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement; and to this end no means are more directly and immediately suitable

than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

This language is so applicable to the statute under consideration that I have seen fit to insert it at length.

It will be remembered that the Court here is speaking of a statute which takes away from a certain class of citizens a privilege that they had theretofore enjoyed—that of voting.

It seems to me that this completely answers the objection that the denial of the elective franchise on account of the act or status of the party to whom it is denied is an abridgment of any privilege or immunity of the citizen.

Another objection is suggested to this statute, and that is that it is a law prescribing a religious test for office, and is in violation of the Constitution of the United States. Upon this point it will be observed that the brief for appellant cites no authority. It would be singular indeed if this Court should now for the first time discover that this article of the Constitution was intended to apply to or prohibit such legislation as is here under consideration.

Commentators upon the Constitution appear unanimously to have always considered this clause as a mere construction of the one that immediately precedes it; but I desire to call the Court's particular attention to the fact that in this respect the law under consideration differs in no material point from that under consideration in the case of Murphy *vs.* Ramsey, 114 United States, 15.

But this Court has gone further. By the provisions of the law known as the Edmunds law, being the act of March 22, 1882, it provided that any person who believes that it is

right for a man to have more than one living and undivorced wife shall be incompetent to serve in the office of grand or trial juror.

In the case of Clawson *vs.* The United States, 114 United States, page 477, this Court held that that statute disqualifying the citizen for the important office of grand or trial juror on account of mere religious belief or opinion was a valid law.

This, in reality, goes far beyond the requirement of the law in question. Under this law a man may believe what he pleases and still vote or hold any office, but he must not overtly and voluntarily associate himself with others for the propagation and practice of crime. If he does he waives or forfeits his right to vote, and this is all that the statute requires of him.

It would seem that the statute sustained and upheld in Clawson *vs.* The United States did require, to a certain extent, a religious test for the office of grand or trial jurors, but I believe it was not claimed in that case that it violated article six of the Constitution on that account.

I think I need say nothing further upon this point.

The last objection made to this statute is that it is void, because Congress has exercised its power on the same subject. I will concede at once that in matters of concurrent jurisdiction between State and Federal Governments, where the Federal Government has acted and prescribed generally a rule of conduct or of action by statute, that the States have no power or authority to legislate upon the same subject; but that is not the question here presented.

If the contention of counsel can be maintained at all, it is only upon the theory that section 1860 of the Revised Stat-

utes of the United States, which forms a part of the organic law of Idaho Territory, is repealed by the eighth section of the act of March 22, 1882.

This, I understand, is the contention of counsel for appellant. It would seem from their argument that they do not design to claim that section 1860 is repealed for all purposes, but that it is repealed so far as it permitted the Legislature to legislate upon the subject of the qualification of voters or their disqualification on account of the practice of crime.

As I understand section 8 of the act of March 22, 1882, it presents a fifth limitation to section 1860, and in its general scope and purpose is in all respects similar to the first and third limitations found in that section as originally enacted.

The first limitation is, as above stated, that the territorial Legislature shall not permit minors and aliens who have not declared their intentions to become citizens to vote or hold office. It has never been claimed, I believe, that this limitation gave to all other citizens and persons the elective franchise in the Territories.

The third limitation is that the Legislature shall not confer the franchise upon soldiers and sailors who have made their home in the Territory less than six months. I believe it has never been claimed that this conferred the franchise upon soldiers and sailors who had made their home in the Territory more than six months.

This limitation, found in the eighth section of the act of March 22, 1882, and which we have denominated the fifth limitation, simply provides that certain males who are polygamists, or bigamists, or who cohabit with more than one woman, and the women who cohabit with them, shall not

be allowed the franchise by the territorial Legislature, and it seems to me there is no more reason for contending that this confers the franchise upon all others than in either of the other two instances that were in the original enactment.

In other words, our contention is that section 8 of the Edmunds law is purely and simply a limitation upon the general power granted in section 1860 of the Revised Statutes of the United States, and that the extent of that limitation is fully manifested in the language of the section itself, which is as follows:

"That no polygamist, bigamist, or any person cohabiting with more than one women, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment, or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any Territory or place or under the United States."

It would seem that this language was sufficiently explicit to admit of no misunderstanding. If it, with section 1860 of the Revised Statutes of the United States, were found in substance in the constitution of any State, I can hardly believe that a court would ever be called upon to construe them.

The limitation of this enactment is too manifest to be misunderstood. It is simply to the purpose and effect that no person guilty of certain acts or found in a certain status or condition shall be allowed to vote or hold office.

It is quite certain that the law under consideration here does not violate this limitation; does not confer upon biga-

mists and polygamists or persons guilty of unlawful cohabitation or any or either of them the right to vote, and this is what the Legislature is prohibited from doing.

Is section 1860 repealed by this section 8 referred to? Repeals by implication are not favored, and I may say, in this day, are very rarely intended by the law-making power.

"When two acts are seemingly repugnant they must, if possible, be so construed that the latter may not operate as a repeal of the former."

See Blaine *vs.* Baily, 25 Indiana, 165.

This Court has repeatedly declared the true rule in substance.

I make the quotation from Kinney's Digest.

"To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled."

See Wood *vs.* U. S., 16 Pet., 342.

McCool *vs.* Smith, 1 Black, 459.

Furman *vs.* Nichol, 8 Wallace, 44.

Clay County *vs.* Savings Society, 104 U. S., 579.

Ex parte Crowdog, 109 U. S., 556.

Chew Heong *vs.* U. S., 112 U. S., 536.

"An affirmative statute containing no expression of a purpose to repeal an existing statute will not be deemed to repeal it, there being no irreconcilable conflict between them, and the latter statute not covering the whole ground of the earlier one, and it not being clear that it was intended as a substitute for it."

See Red Rock *vs.* Henry, 116 U. S. 596.

It is not claimed by counsel that there is an express repeal of section 1860. It cannot be claimed that section 8 of the

act of March 22, 1882, covers the whole ground provided for by section 1860. Therefore it seems to me that under the authority just cited it must be held that it is not intended to repeal it.

I concede at once that the Legislature of Idaho, and of every other Territory in the Union, has only such powers as are granted to it by Congress, but where a grant was full and complete, as that made by section 1860, it would seem preposterous to hold that it was withdrawn without some express and explicit withdrawal in an act of Congress.

If we are correct in the claim that section 8 of the Edmunds law is merely an additional limitation upon the general grant of power in section 1860, it can hardly be urged that the act of the Legislature under consideration violates that limitation.

Upon page 59 of the brief of counsel for appellant the proposition is laid down that the Mormon Church is not a criminal organization, and the remainder of the brief is devoted to establishing that proposition. It consists somewhat of argument, but principally of testimony from the counsel. All that I have to say in reply to it is that in this case and upon this appeal the fact that the Mormon Church described in the indictment is a criminal organization is a conceded fact. If this Court were sitting to try the question of fact purely upon this record, it could only come to one conclusion, and that is that the appellent admits that the Mormon Church is a criminal organization, and that he is a member of it.

I shall not attempt at this time to testify in the case in opposition to the statements made by counsel for appellant, but I would call the attention of the Court to the fact that

in the case of Woolley *vs.* Watkins, reported in 22 Pacific Reporter, at page 106, that very identical question as to the criminality of this organization was the question in the court below and was decided adversely to the church, the court holding expressly that it was a criminal organization, and that judgment was affirmed by the supreme court of the Territory of Idaho.

I might call attention to another matter that is within the knowledge of counsel, and perhaps of the Court, that the very same question has been recently tried in Salt Lake City and was decided on the thirtieth of last month. After a full and complete hearing and argument by able counsel upon both sides, the court held that it was a criminal organization of such character that its members were not entitled to admission as citizens of the United States, and upon that ground, and that ground alone, refused to admit them as citizens.

I simply cite these matters as matters of judicial history and precedent to show that the labored statement of counsel to the effect that the Mormon Church is not a criminal organization is not worthy of consideration in this Court.

I think I need not cite authority to show that membership in an organization or association of this character is purely voluntary. It can only be acquired, it is true, by the voluntary act of the person desiring to become a member and the consent of the order or its proper authorities; but membership may be renounced or dissolved by voluntary act of the member alone; so that, while opinion or belief may be involuntary, membership is purely a voluntary affair.

The question presented by this case is very materially different from that passed on by this Court in Cummings

vs. Missouri, 4 Wallace, 277, and *Ex parte* Garland, 4 Wallace, 333, and Pierce *vs.* Carskadon, 16 Wallace, 234. The ground upon which the constitutional provision of Missouri was assailed in the Cummings case and the law of Congress in the Garland case, and the law of West Virginia in Pierce *vs.* Carskadon has not been urged upon this hearing; at least, is not set out in the brief nor urged as affecting the validity of this law. I shall therefore simply point out what I conceive to be the difference between this case and those above referred to, and without other citation of authority pass this matter.

In the Cummings and Garland cases it seems to me that the act complained of invaded a right of the citizen which existed in a state of nature and was a natural right, to wit, that of acquiring property by his own toil or following an avocation of his own choice.

In Pierce *vs.* Carskadon the law complained of closed the courts to all who would not take a certain oath. In the very nature of things, many at that time could not truthfully take it. It was enacted after the acts were done which they were required to swear had not been done, and the effect of the law was to make it a bill of pains and penalties, which, of course, could not be constitutionally done.

The law under consideration, as was stated in Murphy *vs.* Ramsey, acts upon the present status and condition of the individual. It does not even go so far as the law of Congress of March 3, 1887, which requires a party to swear as to his future conduct and intentions; nor does it look back as to what a party has done. It only looks to the present condition of the intending voter. If he is a member of a criminal organization of any kind he cannot vote. If he is not a mem-

ber of such organization, nor under any of the other disqualifications named in the statute, he may vote.

A very novel proposition is presented upon page 52 of the brief for the appellant. As I understand it, the contention is that if an organization be in existence which teaches, advises, counsels, and encourages its members to commit crime, that unless they teach persons to commit it as a duty resulting from membership, or as a rite or ceremony of the order, that it would not disqualify them from voting.

Now it must be apparent from reading the statute that no such thing is true. The statute is:

"Or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise."

It would seem that a portion of this clause is expressly overlooked by counsel in order to put upon it a strained construction to the effect that a religious test is manifest from the language of the statute itself.

I need scarcely remind this Court of the delicate task it assumes when it is asked to set aside and overturn a legislative enactment. In Fletcher *vs.* Peck, 6 Cranch, 87, this Court fully laid down the true rule, and it has not since been changed. In that case Justice Marshall says:

"The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations

which that station imposes; but it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

It is impossible for me, after reading the brief of counsel and all the study that I have given this case, to see where the conflict is between the law in question and the Constitution of the United States. I will admit that the organic act, so called, which is embraced in various sections of the Revised Statutes of the United States, stands in lieu and stead, so far as the Territories are concerned, of a constitution in a State.

It is apparent, upon examination of the organic law of the Territory of Idaho, that nowhere does Congress attempt to fix the qualifications of voters except at the first election. It is not pretended that this is the first election in Idaho Territory or that section 1859 of the Revised Statutes applies to it. It is a matter within the judicial knowledge of this Court. It is known that it is not the first election.

Passing that election, Congress has nowhere attempted to say who shall vote at elections in the Territory. It has said that certain designated classes shall not vote. It has said that the Legislature shall not deny the franchise on account of race, color, or previous condition of servitude; but in the same connection has said that, subject to these restrictions the Legislature must say who shall and who shall not vote in the Territory.

In conclusion, I claim that the right to vote is a conventional and social privilege granted or withheld by uniform